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DECISIONS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

relating to

THE BRITISH NORTH AMERICA ACT, 1867

and

THE CANADIAN CONSTITUTION 1867-1954

VOLUME III

ARRANGED BY

RICHARD A. OLMSTED, Q.C.,
of the Department of Justice

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QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1954

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[PRIVY COUNCIL.]

J.C. * 1931 Nov. 23.

O. MARTINEAU AND SONS, LIMITED ..... } APPELLANTS;

AND

CITY OF MONTREAL AND ANOTHER .... RESPONDENTS.

1932 A.C. p. 113.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Legislative power—Expropriation by City of Montreal—Assessment of compensation—Competence of tribunal—Finality of award—City of Montreal Charter, art. 429—Quebec Public Service Commission Act (R.S. Queb., 1925, c. 17)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 96, 129.

Having regard to s. 129 of the British North America Act, 1867, the president or acting-president of the commission appointed under the (Quebec) Public Service Commission Act by the Lieutenant-Governor in Council, when assessing, under art. 429 of the City of Montreal Charter, the compensation to be paid for land expropriated by the city, does not act as a judge of a superior district or county court, so as to make the appointment invalid under s. 96 of the Act in that it is not by the Governor-General, and the tribunal consequently incompetent. At confederation compensation was assessed by commissioners, appointed by the Superior Court under an Act of 1864, who did not act as judges of any Court referred to in s. 96; they were a legal commission or authority within s. 129, so that the legislature of Quebec under that section, combined with s. 92, head 13, had exclusive authority to repeal the Act of 1864 and to assign the assessment of compensation to the present commission, the alteration in the mode of appointment being a matter of procedure within the legislative competence.

As by art. 429 awards made thereunder are to be final and not open to appeal, they can be questioned only for want of jurisdiction.

Fraser v. *City of Fraserville* [1917] A.C. 187 followed.

Judgment of the Court of King's Bench affirmed.

APPEAL (No. 26 of 1931) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (December 12, 1930), affirming a judgment of the Superior Court (January 2, 1930).

A quarry owned and worked by the appellants having been expropriated by the city of Montreal under the provisions of its charter, the compensation payable was assessed under art. 429 of the charter (as amended by 15

1932 A.C. p. 114.

*Present:—LORD BLANESBURGH, LORD MERRIVALE, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

J.C. 1931 O. MARTINEAU AND SONS, LD. v. MONTREAL CITY.

Geo. 5, c. 92, s. 38, Quebec) by the president of the Quebec Public Service Commission, established by R.S. Queb., 1925, c. 17, as subsequently amended.

The appellants brought an action in the Superior Court of the Province to annul and set aside the expropriation proceedings on the grounds: (1.) that the Quebec Public Service Commission Act and art. 429 of the charter of the city were unconstitutional and ultra vires the Province, in that the members of the Commission were appointed by the Lieutenant-Governor in Council, whereas they exercised judicial functions, and therefore, under s. 96 of the British North America Act, 1867, could be appointed only by the Governor-General; (2.) that the award had been made upon an improper principle, and failed to allow compensation in respect of certain of the stone.

The Attorney-General for Quebec intervened in the action, and was a respondent in the present appeal.

The trial judge (Archer J.) dismissed the action, holding that the legislation in question was intra vires, and that there was not ground for setting aside the award.

An appeal to the Court of King's Bench, Appeal Side, was dismissed by a judgment delivered by Dorion J. and concurred in by Bernier, Howard and Galipeault JJ.

1931. July 6, 7, 9, 10. *St. Germain K.C.* and *Pritt K.C.* for the appellants.

St. Pierre K.C. for the respondent city.

Lanctot K.C., *Geoffrion K.C.* and *M. Alexander* for the respondent Attorney-General.

[In addition to cases mentioned in the judgment of their Lordships, reference was made for the appellants to *Groenvelt* v. *Burwell* (1); *Winnipeg Electric Ry. Co.* v. *City of Winnipeg* (2); *City of Montreal* v. *Drummond* (3); and *Valin* v. *Langlois*. (4) The respondents relied on the British North America Act, 1867, s. 92, head 8 (municipal

1932 A.C. p. 115.

(1) (1698) 1 Raym. (Ld.) 454.
(2) (1916) 30 Dom. L.R. 159.
(3) (1876) 1 App. Cas. 384, 444.
(4) (1879) 3 Can. S.C.R. 1; see also 5 App. Cas. 115.]

institutions) and head 14 (the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, ... and including procedure in civil matters in those Courts), in addition to s. 129 and s. 92, head 13, referred to in judgment.]

Nov. 23. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The action out of which this appeal arises was instituted by the appellant company in the Superior Court, District of Montreal, on September 3, 1927, in order to have declared unconstitutional and inoperative, so far as they affected its own proprietary interests, certain proceedings taken by the city of Montreal for the expropriation of the appellant company and other contiguous owners from properties of theirs required by the corporation for the extension of Rosemount Boulevard from Chambord Street to Papineau Street, all within the area of the city. Thirty-two properties were scheduled for this extension. Those in the plan of expropriation numbered 21, 22 and 23 belonged to the appellant company, and it is with them that the present litigation has been concerned. They represent a strip of land 500 feet in length and 266 feet in breadth, constituting the centre of a quarry then in active operation by the company.

On June 17, 1927, the corporation, following, as it conceived, the procedure prescribed by the city's charter, presented to the Superior Court of the Province of Quebec a petition praying that the Court would fix the day for the Public Service Commission of Quebec, by its president, to proceed to inquire into and assess the compensation payable to the different expropriated proprietors, and the date also on or before which the commission should report the result of its inquiry. By an order of Court on that petition made the same day the commission was directed to commence its work by the beginning of the month of August following and to make its report by the end of the same month.

The "enquête" directed was held by the president of the commission. It commenced on August 1, 1927. The appellant company duly appeared and supported its claims

1932 A.C. p. 116.

J.C. 1931 O. MARTINEAU AND SONS, LD. v. MONTREAL CITY.

for compensation both by argument and by evidence, not then taking any objection either to the regularity of the preliminary procedure, or to the competence of the commission or its president effectively to deal with the questions referred. The commission's report was made on August 22, 1927, the amount of indemnities thereby awarded in respect of the thirty-two properties amounting to an aggregate sum of $219,172.08. Of that sum the indemnities awarded to the appellant company for its properties were fixed as follows: No. 21, $2,036.30; No. 22, $114,917.90; No. 23, $1,755.60—making a total of $118,709.80.

It was explained in the report that the sum of $114,917.90 awarded in respect of the proprety numbered 22 included the value of lands expropriated and exploited as a quarry, and also the damages suffered in respect of that exploitation as well by the taking of the property of the appellant company No. 22 as of its properties Nos. 21 and 23.

To the report when published the appellant company took the gravest exception and this action was, as already stated, commenced on September 3, 1927, doubtless in order to forestall an application by the city to the Court to homologate the report, of which public notice had been duly given for September 6. On that application the report was homologated by a judgment of the Superior Court of that date save as to the properties of the appellant company, with reference to which no order was made by reason of the pendency of these proceedings.

The action was tried in the Superior Court of Quebec by Archer J. On January 2, 1930, he dismissed it. An appeal to the Court of King's Bench (Appeal Side) for Quebec was on December 12, 1930, likewise dismissed. The present is an appeal from the judgment of dismissal of that date.

In the Courts of Quebec the objections taken by the appellant company to the report of the commission were numerous and varied. There were objections to the regularity of the initial procedure adopted by the city: to the right of the city to expropriate the appellant company from its scheduled lands having regard to their user, extent and quality. But all other objections having in Canada been disposed of adversely to the appellants, those taken before the Board were confined to two.

1932 A.C. p. 117.

The first, which may be described as the constitutional objection, was that the provisions of the charter of the city of Montreal, a Provincial statute, as well as those of the Public Service Commission Act, also a Provincial statute, in compliance with which the award was made, were unconstitutional in that they attributed to the president of the Public Service Commission, an official appointed by the Province, a judicial power and judicial functions which under the British North America Act, 1867, could be conferred only by the Governor-General of Canada.

The second objection, quite different in character, was directed to the report itself. The amount of compensation thereby awarded to the appellant company was, it was objected, so small, in view of the evidence led at the inquiry, as to constitute by itself an injustice to the appellant company amounting to actual illegality.

In view of the constitutional issue thus raised by the appellant company the Attorney-General for Quebec has been throughout a party to the proceedings, and, while taking no part in the discussion of the appellant company's second objection, he has actively contested the correctness of the company's constitutional imputations upon the validity of the report.

Notwithstanding that the case of the appellant company on what may be called the merits only arises if and when it has failed on its first and main objection to the report, it will be convenient to deal with that case at once.

It, of course, presupposes the formal validity of the award. It assumes that the president of the commission was fully empowered to make a proper award, and that the award which he has made was, except as to the inadequacy of compensation allowed, unobjectionable. But the appellant company is on that footing at once confronted with a serious preliminary difficulty, in that art. 429 of the city's charter, which, as it now stands, provides for the ascertainment by the president of the Public Service Commission of the compensation to be paid to the proprietors of expropriated lands, says that there shall be no appeal from the president's decision, while, by the statute constituting the commission (17 Geo. 5, c. 16) it is provided in

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effect that in expropriation matters the decision of the commission even upon a question of law shall be final. It follows accordingly that the permissible interference by any Court with an award made in such an expropriation case as the present is confined within the narrowest limits, the nature of which has been laid down in judgments both of this Board and of the Supreme Court of Canada. In *Fraser* v. *City of Fraserville* (1) their Lordships, dealing with a statute which made the award of arbitrators final and without appeal, observed "that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shown that the value is not that which they were appointed do determine, are free from challenge." And the Supreme Court of Canada, in the later case of *Royal Trust Co.* v. *City of Montreal* (2), had to deal with just such an award as this, and there Davies J. observed: "The statute makes the award of the commissioners, in such cases as the present, final and without appeal. In order to give ground for attacking it, either highly improper conduct on the commissioners' part, or fraud, or the proceeding by the commissioners in making the award upon an improper principle, must be clearly shown." And the present Chief Justice of Canada in the same case observes: "There is no appeal from an award such as this. The statute expressly excludes it . . . . without entertaining an appeal an award may not be set aside solely because the Court is of opinion that it is too high or too low—even very considerably so—unless the disparity is so great that it is clear that the award must have been fraudulently made or that the arbitrators must have been influenced by improper or illegal considerations. The Court of King's Bench has held that neither of these grounds of invalidity has been established, and the clear case necessary to justify a reversal of its judgment, in my opinion, has not been made out."

1932 A.C. p. 119.

In the present case no impropriety of conduct on the part of the president of the Public Service Commission is even hinted at; no suggestion is put forward that in making his report he has been influenced by improper or illegal

(1) [1917] A.C. 187, 194.

(2) [1918] 57 Can. S.C.R. 352, 357, 366.

considerations. Nor does error appear upon the face of the report. It is not possible from a perusal of it to deduce the principles on which the president acted, or to discover the method by which he reached the amount of compensation awarded. He does there refer to the fact that, as by law he was entitled to do, he had inspected the scheduled properties. It may, therefore, be reasonably inferred that his conclusions were not unaffected by what he then saw. But nothing more in this direction appears on the report, and the appellant company did not think fit at the trial to call the president to explain its findings. The company was content to rest its attack upon them merely by a reference to three separate sheets of notes or calculations in the handwriting of the president, found apparently amongst his papers produced to the Court and showing, as was suggested, with reference to the appellant company's properties, the process of reasoning by which the president arrived at the sum which by way of compensation he awarded in respect of each. Then by a comparison of these figures with the evidence led at the inquiry the appellant company sought to show such things as that in one direction the president had fixed a figure of value lower than that placed upon the property in question by some witness for the city: that in relation to another figure he had erred in law: that in relation to a third he had erred in fact, and so on.

Their Lordships do not consider themselves at liberty to follow the appellant company on this expedition of inquiry into the origins of the president's figures. They have been unable to satisfy themselves that they are entitled even to look at these notes of his, for it has not been explained how, if at all, they became evidence in the action or admissible as such. It would in any case be, in their judgment, unjust to the president himself to rely upon the notes without any opportunity afforded him of explaining fully their meaning or their origin. It is perhaps, however, enough to say with reference to the use sought to be made of his notes by the appellant company, that the president, who had, as already stated, himself inspected the properties,

1932 A.C. p. 120.

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was not bound, on a question of value, to accept the evidence of any witness, and that his views of the law are not any more than his findings of fact open as such to review.

The conclusion on this matter of the learned trial judge who very carefully investigated it was that the award could not, in respect of any of the matters complained of by the appellant company, be questioned, and the Court of King's Bench agreed with him. Their Lordships must have been well satisfied that these concurrent findings were clearly wrong before they would have ventured to advise His Majesty to displace them. But they see no sufficient reason to doubt their correctness, and in their judgment this objection to the report cannot be sustained.

But it was the constitutional objection to its validity which formed the main subject of discussion before the Board. Once again, as so often before, is the question raised whether, in reference to the administration of justice, Provincial legislation has overrun the limits of Provincial competence. The case made by the appellant company is that in the statutes to which reference will be made in a moment, the legislature of Quebec has trespassed upon the power given to the Governor-General in the matter of the appointment of judges by s. 96 of the British North America Act, 1867. A very serious question is thereby raised, for it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the judges of the superior, district and county courts in each Province is a cardinal provision of the statute. Supplemented by s. 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these judges, and also by s. 90, which provides that the judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary. A Court of construction would

1932 A.C. p. 121.

accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by Provincial legislation.

But by s. 92, head 13, of the Act, as is well remembered, there is conferred upon the Provincial legislature the exclusive right of making laws in relation to property and civil rights in the Province and (by head 14) in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts. These exclusive Provincial powers have made it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under s. 92 of the Act, and legislation which is beyond its competence by reason of s. 96. This observation may be illustrated by two instances, neither of them remote from the present case, the first on the one side of the line and the second on the other. In *Reg.* v. *Coote* (1) it was held by this Board, in an appeal upon which, it must be noticed, the respondent was not represented, that certain statutes of Quebec appointing officers named "fire marshals," with power to examine witnesses under oath and to inquire into the cause and origin of fires and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the Provincial legislature. On the other hand, in a British Columbia case in 1890—*Burk* v. *Tunstall* (2)—it was held by Drake J. that while it was within the competence of the Province to create mining Courts and to fix their jurisdiction, it was not within its competence to appoint any officers thereof with other than ministerial powers. The learned judge, in the course of his judgment, referring to s. 96 of the Act, observes, as their Lordships think with reason: "It is true that the language used in that section is limited to the judges of the superior, district and county courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts were excluded. If this were so the Provincial legislature would only have to constitute a Court by a special name to enable them to avoid this clause. But in

1932 A.C. p. 122.

(1) (1873) L.R. 4 P.C. 599. (2) (1890) 2 B.C.R. 12.

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the section itself, after the special Courts thus named, the Courts of probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that s. 96 was intended to be general in its operation."

The widespread modern legislative tendency to create what may be termed administrative tribunals to determine specific matters of controversy has undoubtedly in many cases accentuated the difficulty of defining in this matter the frontier between Provincial and Dominion territory. Nor does the difficulty arise only in Canada. In Australia also under the Commonwealth Constitution it appears in another form. This is well illustrated in the recent case before this Board of *Shell Co. of Australia* v. *Federal Commissioner of Taxation*. (1) In that case it will be found that a "Board of Appeal" to hear income tax appeals, created by the Australian Income Tax Assessment Act, 1922, had been held to be invalidly created as exercising part of the judicial power of the Commonwealth with judges appointed for a term of years and not for life, as required by ss. 71 and 72 of the constitution of Australia; while a substituted statute constituting in similar matters a "Board of Review," with modified powers, was by the decision of the Board treated as an administrative body, not exercising the judicial power of the Commonwealth, and as a result constitutional, although its members were appointed only for a term of years. The judgment of the Board (in that case delivered by the Lord Chancellor) shows the narrowness of the line of division between judicial and administrative activity.

In the present case, however, it will be found, as their Lordships think, that difficulties serious in other cases are resolved by reason of its special circumstances which are found latent in the statutory procedure regulating, at confederation, the compulsory acquisition of property by the city of Montreal. That procedure, it is suggested, as the result of bringing to bear upon it the relevant provisions of the British North America Act, thereby became and, with the modifications that have later been introduced, thenceforth remained a matter of Provincial concern alone.

1932 A.C. p. 123.

(1) [1931] A.C. 275.

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In tracing the development of the procedure in question a beginning may, for present purposes, be made with the Act of the Province of Canada of 1851 (14 & 15 Vict. c. 128), consolidating the provisions of the statutes incorporating the city. By s. 68 of that Act the compensation payable on expropriation was to be fixed by the verdict of a special jury summoned, on petition of the corporation, by the justices of the peace of the city in special session. On payment or deposit by the corporation in manner prescribed of the compensation fixed by the jury the title to the expropriated property passed to the corporation. No Court apparently under the procedure of this Act had any part or lot in the matter.

The Act of 1851 was superseded by a statute of 1864 (27 & 28 Vict. c. 60), intituled an Act to amend the Acts relating to the corporation of the city of Montreal. This was the Act on the subject in force at confederation. By s. 13, sub-s. 1, the council of the city in cases of expropriation was required to apply by petition to the Superior Court, calling upon it to nominate three competent and disinterested persons to act as commissioners to fix and determine the amount to be paid in respect of any expropriated property. The Court on that petition and on being satisfied that all preliminary statutory requirements as to notice and the like had been observed, was required to appoint three such commissioners and to fix the day on which they should begin their operations and also the day on which they should make their report. By s. 13, sub-s. 7, it became the duty of the commissioners diligently to proceed to appraise the prescribed compensation. They were authorized and required to hear the parties, to examine and interrogate their witnesses and those also of the city, but to make such examination viva voce and not in writing, so that it might form no part of their report, any law, usage or custom to the contrary notwithstanding. The report of the commissioners upon its becoming final in manner prescribed in intervening sub-sections was (sub-s. 12) to be submitted by the corporation to the Superior Court or a judge thereof "for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have

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been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested and consequently not open to any appeal." It will be observed in relation to this procedure that while the commissioners were appointed by the Superior Court, that Court all formalities observed, was required exercising no further judgment, to confirm and homologate their report, which was itself final and not open to appeal.

The first substantial modification of this procedure made after confederation is to be found in the statute of Quebec of 1899 (62 Vict. c. 59), an Act to revise and consolidate the charter of the city. Article 429 of the charter as then consolidated ran, so far as is now material, thus: "For the purpose of ascertaining the compensation to be paid to the proprietor whose building may be affected by . . . . expropriation . . . . a board of expropriation commissioners shall be appointed. . . . . Such board shall consist of one of the recorders of the city (who shall be the president and convener of the said board), two of the assessors of the city to be named by the council, and two other commissioners who shall be named by the Superior Court or a judge thereof upon a petition to that effect to be made by or on behalf of the city after continuous notice in two daily papers . . . . during a period of at least two weeks. The two latter commissioners shall be appointed upon the exclusive suggestion of the party to be expropriated. There shall be no appeal from the decision of such commissioners."

1932 A.C. p. 125.

Matters so remained from 1899 to 1925. In that year was passed an Act further amending the charter of the city, and, incidentally, revising the procedure in expropriations by the substitution of a system to which constitutional objection is now taken by the appellant company.

It will not be inconvenient to set forth from the terms of the charter so confirmed so much of the new procedure as is material to the present discussion:—

"429. The president or the acting-president of the Quebec Public Service Commission shall ascertain the compensation to be paid to the proprietor whose building or land is to be expropriated and determine, if need be, the rights of the city mentioned in the foregoing articles for the acquisition

of the whole or part of the said buildings. There shall be no appeal from the decision of the president or acting-president of the Public Service Commission."

"430. . . . . The Court or judge shall fix a day on which the president or acting-president of the Quebec Public Service Commission shall proceed with his work and also the day upon which he shall make his report. . . . ."

"434. In order to come to a decision respecting such expropriation the president or acting-president . . . . shall proceed with all due diligence to establish the value of the land and buildings to be expropriated . . . . He shall have power to call, summon and examine witnesses under oath as well as all parties interested and to require the production of titles and documents: he shall inspect the properties to be expropriated and take all other measures which he may deem necessary to establish the fair and exact amount of the compensation to be paid for the land, buildings and servitudes to be expropriated . . . . [His] report . . . . shall be signed and shall establish the amount for which the city shall have the right to acquire the immovables for the purpose of such expropriation."

"438. So soon as the president . . . . has completed and signed his report in accordance with the foregoing provisions he shall deposit the same in the office of the city clerk, who shall forthwith give public notice thereof and of the day on which such report will be submitted to the Superior Court or to one of the judges thereof as the case may be for confirmation or homologation . . . ."

"439. On the day specified in the notice the city shall submit to the Superior Court or to one of the judges thereof the report . . . . for confirmation and homologation and such Court or judge as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided have been observed, shall confirm and homologate the said report, and the decision of the Court or judge shall be final as regards all interested parties and shall not be subject to appeal."

1932 A.C. p. 126.

As to the Quebec Public Service Commission to whose president or acting-president the above duty is entrusted, it was created by a Provincial Act—the Quebec Public Service Commission Act of 1925, as amended by later Acts of 1926 and 1927.

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The commission consists of three members appointed by the Lieutenant-Governor in Council for a term of ten years (1925, s. 4). One of the commissioners is to be appointed president of the commission and another of them vice-president (1925, s. 6). The president or the vice-president may sit alone to hear and decide any expropriation matter within the jurisdiction of the commission (1897, s. 1). The opinion of the president upon any question which, in the opinion of the commissioners is a question of law, is to prevail. There are provisions, securing the disinterestedness of every commissioner (1925, ss. 12 and 13), fixing the duties of the secretary (1925, s. 19), providing for the payment by the Government of the Province of the salaries of the commissioners and staff (1925, s. 22), and of the pension of the president (1925, s. 26), while by s. 28 *(h)*, as settled by s. 6 of the Act of 1926, there is conferred upon the commission jurisdiction over a wide range of subjects, including by sub-s. 9 jurisdiction "notwithstanding any provision in the charter of such cities respectively . . . . on any question arising respecting expropriation by the city of Quebec or by the city of Montreal for any municipal purpose (including the fixing of the compensation) which under the said charters is within the jurisdiction of any board of commissioners, assessor, arbitrator or other functionary or officer, provided that every provision relating to expropriation in either of the said charters shall continue to govern expropriation by each of such cities respectively with the exception of the modification introduced by this paragraph." The decision of the commission on any question of fact within its jurisdiction is final (1925, s. 49), and by s. 58 an appeal is to lie to the Court of King's Bench (Appeal Side) from the final decision of the commission upon any question as to its jurisdiction or upon any question of law, except in expropriation matters.

1932 A.C. p. 127.

This historical survey brings into prominent relief one or two facts of suggestive importance. Since 1851 no Court of the Province has ever had the right either to make or to inquire into the merits of any compensation award in expropriation proceedings originated by the city: the duty of the Superior Court to direct that the compensation be

assessed and to homologate the report of its amount when made was substantially the same at confederation as it remains to-day under the later Provincial legislation now impugned; the procedure of the commissioners at confederation was not to be in strict accord with legal practice, and the only difference in substance, so far as the intervention of the Superior, or any other, Court is concerned between the procedure at confederation and the procedure now is that by the Act of 1864 the commissioners to hold the inquiry and make the compensation award were appointed by the Superior Court, whereas the president or acting-president of the Quebec Public Service Commission to whom that duty is now assigned is a Provincial officer appointed by the Lieutenant-Governor in Council. Under the Act of 1899 two only out of the members of the board of five expropriation commissioners fell to be appointed by the Superior Court, and that Act was in force and operative for twenty-six years. Neither before confederation nor since has the duty of assessing compensation been discharged by any judge of the Province, whether of a superior, district or county court. That is not one of his judicial duties. It is observable also that the validity of the Provincial legislation upon this subject since confederation has never until now been called in question. Very many titles to property must depend upon its constitutional validity. It would be a serious matter indeed if that were now to be doubted.

1932 A.C. p. 128.

It is accordingly with some sense of relief that their Lordships, in agreement with the Courts of Quebec, are of opinion that the assignment to the Quebec Public Service Commission of the duty of assessing compensation in expropriation proceedings by the city of Montreal was within the competence of Provincial legislation. They express no opinion—they have not directed their attention to the question—whether the statutes constituting the commission are in relation to other matters within the Provincial field of legislation. Without going into the more general question they reach the conclusion they have expressed with reference to the matter now in hand by a consideration of the terms of s. 129 of the British North America Act, 1867.

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That section, it will be recalled, is in the following terms: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless . . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act."

In their Lordships' judgment the commissioners whose appointment was authorized by the Act of 1864 in force at confederation were "legal commissioners" or "authorities" within the meaning of that section, dealing with property and civil rights in the Province of Quebec within the meaning of s. 92, sub-s. 13, of the statute, so that the repeal of the Act of 1864 constituting these commissioners with the alteration of the procedure in expropriation, as it has now been altered, is as a result of s. 129 and by reference to the other provisions of the statute within the sphere of Provincial legislation exclusively.

1932 A.C. p. 129.

The commissioners at confederation were not judges either of superior, district or county courts of the Province. The jurisdiction to award compensation was not vested in any of these judges. The fact that the commissioners were appointed by the Superior Court was a procedure provision the continuance or alteration of which became, under the British North America Act, a question of Provincial concern. To their Lordships it appears clear that on the true construction of that Act the Quebec Public Service Commission when now assessing compensation in expropriation cases from the city of Montreal is not acting as a judge either of a superior, district or county court, so that the appointment of its members must under the Act be made by the Governor-General of Canada.

Accordingly their Lordships are of opinion that the constitutional objection taken by the appellant company to the competence of that commission on the present occasion cannot be sustained.

For all these reasons they are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden.*

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Feb. 9.

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p. 304.

[PRIVY COUNCIL.]

In re REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative power—Radio communication—International Convention—Absence of Treaty by British Empire—Matter of national importance—Telegraphs—Works and undertakings connecting Provinces—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91; s. 92, head 10 (a); s. 132.

The Parliament of Canada has exclusive legislative power to regulate and control radio communication in Canada.

Great Britain, Canada (and other Dominions and Colonies) having entered separately into a convention on the subject with foreign countries, the Parliament of Canada, under the general powers conferred upon it by s. 91 of the British North America Act, 1867, to make laws for the peace, order, and good government of Canada, had in relation to the obligations under the convention power similar to that which it would have had under s. 132 if the convention had been a treaty between the British Empire as an entity and foreign countries. The
1932 A.C. p. 305. legislative power of the Dominion extended to inter-provincial radio communication on the same grounds that it extended to inter-provincial aeronautics, and because the matter was within "telegraphs" and "works and undertakings connecting the Provinces with any other, etc.," subjects which s. 92, head 10 *(a)*, excepted from the authority of the Provincial legislatures, and s. 91, head 29, brought within the Dominion authority.

In re Regulation and Control of Aeronautics in Canada p. 54 ante applied.

Observation in *City of Montreal* v. *Montreal Street Ry. Co.* [1912] A.C. 333, 342 discussed.

Judgment of the Supreme Court of Canada [1931] S.C.R. 541 affirmed.

Appeal (No. 84 of 1931) by special leave from a judgment of the Supreme Court of Canada (June 30, 1931) in answer to questions referred to that Court by the Governor-General of Canada in Council under s. 55 of the Supreme Court Act of Canada.

The two questions referred are set out in the judgment of the Judicial Committee. Shortly stated they were: (1.) Has the Parliament of Canada jurisdiction to regulate and control radio communication? (2.) If not, in what particulars is the jurisdiction limited?

The majority of the Supreme Court (Anglin C.J., Newcombe and Smith JJ.) answered the first question in the affirmative and returned no answer to the second. Rinfret

Present:—Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell of Killowen, and Sir George Lowndes.

and Lamont JJ. dissented, being of opinion that the jurisdiction was not complete or exclusive, but was limited in the particulars appearing from their respective judgments. The proceedings in the Supreme Court are reported at [1931] S.C.R. 541.

The International Radiotelegraph Convention, 1927, and the regulations annexed thereto, is set out in the Appendix to the record in the present appeal at pp. 80 to 136. As appears from the preamble to the convention it was concluded between the Governments of about eighty countries there named. These included Great Britain, the Dominion of Canada and other Dominions, British India, various colonies, also numerous foreign countries. The representatives of Canada were appointed by the Governor-General in Council, and with the other signatories were described in the preamble as "the plenipotentiaries of the countries named."

By art. 2 of the convention: "(1.) The contracting Governments undertake to apply the provisions of the present convention in all radiocommunication stations established or operated by the contracting Governments, and open to the international service of public correspondence. . . . . (2.) They undertake, in addition, to adopt or to propose to their respective legislatures the measures necessary to impose the observance of the provisions of the present convention and the regulations annexed thereto upon individual persons and enterprises authorized to establish and operate radiocommunication stations for international service, whether or not the stations are open to public correspondence." 1932 A.C. p. 306.

The convention and regulations were ratified and confirmed on behalf of His Majesty's Government in Canada by an instrument, dated July 12, 1927, and signed by the Secretary of State for External Affairs, Canada, which stated that the convention had been "signed by the representatives of His Majesty's Government in Canada and of the other Governments specified therein." They were ratified and confirmed on behalf of His Majesty's Government in Great Britain by an instrument in the same form signed by the Secretary of State for Dominion Affairs.

In 1929 a treaty was effected, by exchange of notes, between the Governments of Canada, the United States,

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Cuba, and Newfoundland relative to the division between those countries of channels of radio communication, and a further agreement on the subject was in negotiation between Canada and the United States.

Radio was stated to be used in Canada for the following, among other purposes: *(a)* coastal stations for communication with ships; *(b)* coastal direction-finding stations and radio beacons, operated by the Minister of Marine; *(c)* public and private licensed stations; *(d)* for national defence and dealing with forest fires; *(e)* licensed broadcasting stations; *(f)* licensed receiving sets, of which there were nearly half a million.

The revenue collected by the Dominion for fees for licences for the fiscal year 1930-31 (nine months) was $479,488.

1932 A.C. p. 307.

The Parliament of Canada dealt with the subject by the Radiotelegraph Act (R.S. Can., 1927, c. 195), and Regulations made thereunder.

1931. Dec. 11, 14, 15. *Geoffrion K.C.* and *Pritt K.C.* for the Attorney-General for Quebec, appellant; *Frank Gahan* for the Attorney-General for Ontario, intervener, adopting their arguments. *In re Regulation and Control of Aeronautics in Canada* (1) does not apply. It was decided mainly upon the ground that upon that subject there was a treaty between the British Empire and foreign countries, and that by the terms of s. 132 of the British North America Act, 1867, the Parliament of Canada had authority to perform the obligations under a treaty of that kind. In the present case there was no treaty entered into by the British Empire as an entity and binding upon Canada as a constituent member. Canada was separately represented, and its Government contracted with the other signatories, including Great Britain, as a principal. Further, the treaty in relation to aeronautics covered substantially the whole subject, but the present convention was much less comprehensive. It dealt principally with radio in relation to navigation and with interference, matters which the appellant concedes were within the Dominion authority. The appellant does not dispute the Dominion right to deal with such matters involved as come directly

(1) p. 54 ante. (A.C.)

within the enumerated heads of s. 91. There are, however, parts of the subject which are wholly within the Provincial power as to property and civil rights, for instance, the control of broadcasting for educational purposes and as to programmes, especially as to the language used. It is true that broadcasting in one Province may be listened to in another Province, but so also a newspaper published in one Province can be read in others. The fact that broadcasting in one Province may interfere with broadcasting in another does not give the Dominion legislative power over the matter. Apart from specific heads of s. 91 the Dominion has no legislative power over property. A subject need not be wholly within one Province in order to fall within its powers under s. 92, head 13. Inconvenience arising from leaving the Provinces to deal with the matter by combination is no ground for holding that it is within the legislative power of the Dominion: *City of Montreal* v. *Montreal Street Ry. Co.* (1) Even if transmitting instruments are within the Dominion power, receiving sets are not; they are property operating wholly within a Province. Although "telegraphs" in s. 92, head 10 *(a)*, have been held to include telephones, the word cannot be extended to include radio communication. The "works and undertakings" referred to by that head are physical things, not services: *City of Montreal* case. (2) Under s. 92, head 10 *(c)*, the Dominion has power to bring within its legislative authority any broadcasting station if that is to the advantage of Canada; that power supplies every safeguard necessary.

1932 A.C. p. 308.

Tilley K.C. (with him *Varcoe K.C.*) for the Attorney-General for Canada, respondent; *Brooke Claxton K.C.* for the Canadian Radio League, interveners and respondents. This matter is in substance covered by the judgment of the Board in reference to aeronautics. (3) As was there held with regard to aeronautics, radio communication is a matter of national interest and importance, and is a class of subject which affects the body politic of the Dominion; it is moreover a matter as to which there must be a single legislative authority throughout Canada. The change of method in making treaties binding upon the Dominion does not affect the scope of s. 132, or take away the authority

(1) [1912] A.C. 333, 346. (2) [1912] A.C. 333, 342.
(3) pp. 54, 77 ante. (A.C.)

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thereby conferred upon the Parliament of Canada to perform the obligations arising thereunder. But even if s. 132 does not in terms apply to the international convention here in question, the Parliament of Canada had similar authority under the power conferred upon it by s. 91 to make laws for the peace, order, and good government of Canada as the matter was one of national importance, and not within s. 92. Even if, in certain aspects, the matter falls within property and civil rights in the Provinces, the final words of s. 91 exclude Provincial authority, as the matter as a whole comes within s. 91, head 2 (regulation of trade and commerce): *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (1); *Great West Saddlery Co.* v. *The King.* (2) For the purpose of the present question there no valid distinction can be drawn between receiving and transmitting instruments. The authority of the Parliament of Canada extends to inter-Provincial radio on the same grounds that it was held to extend to inter-Provincial aeronautics. Further, that matter comes within "telegraphs", also "works and undertakings connecting the Province with any other, etc.," subjects which s. 92, head 10 (*a*), removes from Provincial authority, and s. 91, head 29, makes enumerated heads of s. 91. There is a joint system of radio communication, and that brings the matter within the words as to "works and undertakings": *Luscar Collieries* v. *McDonald* (3); *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (4) In the *City of Montreal* case (5) there was no joint system. The powers of the Provincial legislature under s. 92 do not enable it to exclude the powers of the Dominion legislature under s. 91: *Dobie* v. *Temporalities Board* (6); *Royal Bank of Canada* v. *The King* (7); *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction.* (8)

Geoffrion K.C. in reply. If the Parliament of Canada has legislative authority to perform the obligations of the convention, although it was not a treaty by the British Empire, s. 132 of the Act of 1867 was superfluous. There is only one case in which a subject assigned to the legislative authority of the Provinces can be brought within

(1) [1896] A.C. 348.
(2) [1921] 2 A.C. 91.
(3) [1927] A.C. 925.
(4) [1905] A.C. 52.
(5) [1912] A.C. 333.
(6) (1882) 7 App. Cas. 136.
(7) [1913] A.C. 283.
(8) [1931] S.C.R. 357.

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the general power of the Dominion legislature, and that is where an emergency exists, and here there was none: *In re Board of Commerce Act, 1919.* (1)

1932. Feb. 9. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is an appeal from a judgment of the Supreme Court of Canada, answering questions referred to it by His Excellency the Governor-General in Council, for hearing and consideration, pursuant to the authority of s. 55 of the Supreme Court Act (R.S. Can., 1927, c. 35), touching the jurisdiction of the Parliament of Canada to regulate and control radio communication.

The questions so referred were as follows:—

"1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?"

The answers of the Chief Justice and the other judges of whom the Court was composed were as follows:—

"THE CHIEF JUSTICE: Question No. 1. In view of the present state of radio science as submitted. Yes. Question No. 2. No answer.

NEWCOMBE J.: Question No. 1. Should be answered in the affirmative. Question No. 2. No answer.

RINFRET J.: Question No. 1. Construing it as meaning 'jurisdiction in every respect' the answer is in the negative. Question No. 2. The answer should be ascertained from the reasons certified by the learned judge.

LAMONT J.: Question No. 1. Not exclusive jurisdiction. Question No. 2. The jurisdiction of Parliament is limited as set out in the learned judge's reasons.

SMITH J.: Question No. 1. Should be answered in the affirmative. Question No. 2. No answer."

(1) [1922] 1 A.C. 191.

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The learned Chief Justice and Rinfret J. expressed their regret that at the time of delivering judgment they had not had the advantage of knowing what was the conclusion reached by this Board on the question referred as to aviation. It is however unnecessary to speculate as to what would have been the result had the learned judges known as we know now that the judgment of this Board (*In re Regulation and Control of Aeronautics in Canada* (1), delivered on October 22, 1931) settled that the regulation of aviation was a matter for the Dominion. It would certainly only have confirmed the majority in their opinions. And as to the minority, though it is true that reference is made in their opinions to the fact that as the case then stood aviation had been decided not to fall within the exclusive jurisdiction of the Dominion, yet had they known the eventual judgment it is doubtful whether that fact would have altered their opinion. For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries." And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.

Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In

(1) p. 54 ante. (A.C.)

other words the argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country, Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the convention with general regulations appended being signed at Washington on

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November 25, 1927, by the representatives of all the powers who had taken part in the conference, and this convention was ratified by the Canadian Government on July 12, 1928.

The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

At the same time, while this view is destructive of the view urged by the Province as to how the observance of the international convention should be secured, it does not, they say, dispose of the whole of the question. They say it does not touch the consideration of inter-Provincial broadcasting. Now, much the same might have been said as to aeronautics. It is quite possible to fly without going outside the Province, yet that was not thought to disturb the general view, and once you come to the conclusion that the convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the aviation case which might be literally transcribed to this. The idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject. The same might at least very easily be said on this subject, but even supposing that it were possible to draw a rigid line between inter-Provincial and Dominion broadcasting, there is something more to be said. It will be found that the argument for the Provinces really depends on a complete difference being established between the operations of the transmitting and the receiving instruments. The Province admits that an improper use of a transmitting instrument could by invasion of a wave-length not assigned by international agreement to Canada bring into effect a breach of a clause of the convention. But it says this view does not apply to the operation of a receiving instrument. Now it is true that a dislocation of a receiving instrument will not in usual cases operate a disturbance beyond a comparatively limited circular area; although their Lordships understand that a

1932 A.C. p. 314.

receiving instrument could be so manipulated as to make its area of disturbance much larger than what is usually thought of.

But the question does not end with the consideration of the convention. Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91, and the exceptions run that the works or undertakings are to be other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province; (*b*) Lines of steamships between the Province and any British or foreign country; (*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces. Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (*a*) within both the word "telegraphs" and the general words "undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

1932 A.C. p. 315.

Their Lordships cannot but think that much of the argument depends on an unwarranted deduction taken from a sentence to be found in the judgment delivered by

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Lord Atkinson in the case of *City of Montreal* v. *Montreal Street Ry. Co.* (1) His Lordship, after saying "the matters thus transferred are . . . .," quotes the sections (*a*), (*b*) and (*c*) and then adds: "These works are physical things, not services." Mignault J. in the aviation case assumed that this sentence applied not only to (*c*) which deals with "works" only, but also to (*a*) and (*b*), and this view has obviously influenced the conclusions of the minority in this case. Now in the first case their Lordships see no reason why the word "works" should not be referred to the same word standing alone in (*c*) and not be extended to (*a*) where it is conjoined with "undertaking," and to (*b*) where it is not used at all. But if their Lordships' surmise as to the view of the Board as expressed by Lord Atkinson is wrong, then they are not bound by and would not agree with the widened proposition. In the wider sense it was in no way necessary for the judgment in the case. What was being dealt with was a street railway which in itself formed no part of a through system and only became so by the legislation which was impugned. "Undertaking" is not a physical thing, but is an arrangement under which of course physical things are used.

Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province." But further, as already said, they think broadcasting falls within the description of "telegraphs." No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph," as given in the Oxford Dictionary, is: "An apparatus for transmitting messages to a distance, usually by signs of some kind." Now, a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. Further, the strict reading of the word "telegraph," making it identical with the ordinary use of it, has already been given up in *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (2)

1932 A.C. p. 316.

(1) [1912] A.C. 333, 342.

(2) [1905] A.C. 52.

There are several words of Lord Macnaghten in delivering the judgment of the Board in that case which mutatis mutandis might well be applied to the argument of the Province here. He said (1): "It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the Company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places." Now it is true that that case was dealing with an established system, while the question here is as to the scope of legislation. But none the less the argument for the appellants there was that the legislation under which the system had been established was ultra vires. Consequently the words of Lord Macnaghten do carry a lesson as to the futility of trying to split what really is one undertaking into two.

1932 A.C. p. 317.

As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley—namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "property and civil rights," or within "matters of a merely local or private nature."

Upon the whole matter, therefore, their Lordships have no hesitation in holding that the judgment of the majority of the Supreme Court was right, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. No costs will be awarded, this being a question to be decided between the Dominion and the Provinces.

(1) [1905] A.C. 59.

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Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency.

Solicitors for appellant; and for respondent, the Attorney-General for Ontario: *Blake & Redden.*

Solicitors for respondent, the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for respondents, Canadian Radio League: *Dehn & Lauderdale.*

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J. F. LYMBURN AND ANOTHER.....APPELLANTS;

AND

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A. H. MAYLAND AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada (Alberta)—Legislative power—Prevention of fraud—Official Investigations—Dominion companies—Criminal law—Security Frauds Prevention Act, 1930 (20 Geo. 5, c. 8; Alb.)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Security Frauds Prevention Act, 1930, of Alberta, provided that no person might trade in securities unless he was registered with the approval of the Attorney-General; a corporation could be registered, and in that case its officials did not need registration. In effect the Act precluded a public company from selling its shares unless it did so through a registered person or was itself registered. By s. 9 the Attorney-General, or his delegate, could examine any person or company to ascertain whether any "fraudulent act," which was very widely defined, had been, was being, or was about to be, committed. The Act imposed penalties for breaches of its provisions, and by s. 20 made it an offence to commit any "fraudulent act" not punishable under the Criminal Code of Canada.

Held, that the Act was within the scope of the powers of the Provincial legislature under s. 92 of the British North America Act, 1867. It was not invalid in relation to Dominion companies, as it did not wholly preclude them from selling their shares unless they were registered, but merely subjected them to competent provisions applying to all persons trading in securities. Nor was it, as a whole, a colourable attempt to encroach upon the legislative power of the Dominion as to the criminal law; so far as s. 20 was invalid as so encroaching it was clearly severable.

Att.-Gen. for Manitoba v. *Att.-Gen. for Canada* [1929] A.C. 260, and cases there applied, distinguished.

Judgment of the Supreme Court of Alberta, 25 Alb. L.R. 310, reversed.

APPEAL (No. 58 of 1931) from a judgment of the Supreme Court of Alberta, Appellate Division, delivered on April 23, 1931.

The appeal related to the validity of the Security Frauds Prevention Act, 1930 (Statute of Alberta, 20 Geo. 5, c. 8). The material provisions of the Act, and the circumstances giving rise to the litigation, appear from the judgment of the Judicial Committee.

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Present:—VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and SIR GEORGE LOWNDES.

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The first appellant was the Attorney-General for Alberta. The Attorney-General for Canada intervened in the appeal by leave.

The judgment appealed from was upon a motion for an interim injunction referred to the Appellate Division by a judge of the Supreme Court.

The Appellate Division, by a judgment delivered by Harvey C.J. and concurred in by Walsh and Clarke JJ., declared that s. 9 of the Act did not apply to the second respondents, Mercury Oils, Ld., as that company had been incorporated under Dominion legislation. The Court was also of opinion that certain provisions of the Act were ultra vires as being in relation to the criminal law, but that they were severable from the sections in question in the proceedings. The judgment is reported at 25 Alb. L.R. 310.

1931. Dec. 15, 17, 18. *Tilley K.C.* and *Geoffrion K.C.* (with them *Frank Gahan*) for the appellants. The Act, as appears from its full title, was for the prevention of fraud in connection with sales of securities. The title may be looked at to ascertain the object of the legislature: *Fenton* v. *Thorley & Co.* (1) Similar statutes have been enacted recently by all but one of the Canadian Provinces. The Act was within the competence of the Provincial legislature under the British North America Act, 1867, s. 92, heads 13, 15, 16. Having regard to s. 3 (*b*) and (*d*), the Act did not make registration necessary in the case of a company issuing its own shares. But in any case the Act did not destroy or impair the status or capacities of Dominion companies so as to be invalid under *John Deere Plow Co.* v. *Wharton* (2) and *Great West Saddlery Co.* v. *The King.* (3) *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (4) is distinguishable, as in that case the Act wholly precluded a Dominion company from selling its shares unless it was registered. A Provincial legislature can validly subject a Dominion company to restrictions in carrying on its business if the restrictions are otherwise competent and common to all companies: *Colonial Building and Investment Association* v. *Att.-Gen. of Quebec* (5); *Great West Saddlery Co.* v. *The King* (6); *In re Companies Act,*

1932 A.C. p. 320.

(1) [1903] A.C. 443, 447.
(2) [1915] A.C. 330.
(3) [1921] 2 A.C. 91.
(4) [1929] A.C. 260.
(5) (1883) 9 App. Cas. 157, 166.
(6) [1921] 2 A.C. 91, 119, 120.

1929. (1) If any of the provisions are ultra vires, the Act should be held invalid only to that extent: *Rex* v. *Nat Bell Liquors, Ld.* (2)

Pritt K.C. (with him *Helman K.C.*) for the respondents; *Varcoe K.C.* for the Attorney-General for Canada, intervener. Sect. 3 (*o*) of the Act excepts the issuance of its own shares by a private company from the registration requirements, it is clear therefore that they apply to a public company issuing its shares. The restrictions imposed upon companies in carrying out purposes for which they have been incorporated by the Dominion so affect their status and capacities that the provisions are invalid as to such companies: *John Deere Plow Co.* v. *Wharton* (3); *Great West Saddlery Co.* v. *The King* (4); *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (5) The inquiries authorized by s. 9 are of so wide a character that the validity of the Act as a whole is called in question. It is invalid, both upon the above ground and as encroaching upon the legislative power of the Dominion with regard to the criminal law under s. 91, head 27, of the Act of 1867; that head means the criminal law in its widest sense: *Att.-Gen. for Ontario* v. *Hamilton Street Ry. Co.* (6) Sect. 20 of the Act, among others, clearly so encroaches; s. 19 purports to give the Lieutenant-Governor power to create offences. The provisions of s. 9 are not within s. 92, head 13 (property and civil rights), of the Act of 1867, but within s. 91, head 2 (regulation of trade and commerce), and s. 91, head 27 (criminal law): *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada.* (7) Under the Dominion Companies Act there were already provisions for official inquiries into the affairs of companies incorporated by the Dominion. The invalid provisions of the Act are so interwoven with it that they cannot be treated as severable: *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (8) Further, the inquiries proposed by s. 9 were of a judicial character, and the appointment of the Attorney-General to conduct them was therefore invalid under s. 96 of the Act of 1867.

1932 A.C. p. 321.

Tilley K.C. replied.

(1) (1931) 25 Alb. L.R. 206.
(2) [1922] 2 A.C. 128, 137.
(3) [1915] A.C. 330.
(4) [1921] 2 A.C. 91.
(5) [1929] A.C. 260.
(6) [1903] A.C. 524.
(7) [1931] A.C. 310.
(8) [1925] A.C. 561.

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LYMBURN v. MAYLAND.

1932. Feb. 4. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of Alberta in proceedings taken by the plaintiffs to challenge powers sought to be exercised by the Attorney-General of Alberta under the provisions of the Security Frauds Prevention Act, 1930 (Alberta), Statutes of Alberta, 20 Geo. 5, c. 8. Under the terms of s. 9 of that Act the Attorney-General or any delegate appointed by him has power to examine any person or company at any time in order to ascertain whether any fraudulent act as defined by the statute or any offence against the Act or the regulations has been, is being, or is about to be, committed. The Attorney-General, Mr. Lymburn, had appointed the defendant, Mr. Frawley, to hold the examination in question, and Mr. Frawley had summoned the plaintiff, Mr. Mayland, to attend him for examination on an inquiry amongst other things into items appearing in the balance-sheet of the other plaintiff, Mercury Oils, Ld., as at December 31, 1930. Mr. Frawley also gave notice that he intended to inquire into a transaction between Solloway Mills & Co., Ld., and the plaintiff Mayland respecting the exchange of certain shares, and the assumption by Mayland of an underwriting agreement entered into between Solloway Mills & Co., Ld., and Mill City Petroleums, Ld. All the companies mentioned are incorporated under the provisions of the Dominion Companies Act.

1932 A.C. p. 322.

The plaintiffs, by their statement of claim, claimed a declaration that the statute or, alternatively, s. 9, was ultra vires the Province, and an injunction restraining the Attorney-General and Mr. Frawley from proceeding with the examination. They gave notice of motion for an interim injunction, which came before Ives J., and with the consent of the defendants was referred by him to the Appellate Division of the Supreme Court. On April 23, 1931, the Appellate Division made an order declaring that s. 9 of the Act had no application to the plaintiff or the three companies mentioned above, and that the defendants had no authority to proceed with the examinations and investigations referred to in the statement of claim. The reasons for the judgment were delivered by Harvey C.J., concurred in by Walsh and Clarke JJ. The learned Chief

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Justice reviewed the statute as a whole, but founded his decision on the ground that the Provincial legislature could not delegate to the Attorney-General power to obtain information unlimited in extent, inasmuch as that legislature itself was restricted in its power to obtain from a Dominion company unlimited information, apparently because such a requirement would clash with the Dominion legislature as to companies. It was therefore held that s. 9 was not applicable to Dominion companies; not as would appear as a matter of construction but because it was ultra vires in relation to such companies, though it would severably be valid as to other companies.

Before the Board the attack was made on a broader ground. The whole Act was invalid so far as it related to Dominion companies, because it destroyed their status by making it impossible for them to issue their share capital. In this respect it was said the case was covered by the decision of this Board in *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (1) It was further contended that apart altogether from Dominion companies the Act was invalid because under the colour of dealing with the prevention of fraud in share transactions it was assuming to legislate as to criminal law, a class of subject reserved to the Dominion. Apart from invalidity, it was further said that if the terms of the Act were examined the three Dominion companies in question, as well as the plaintiff Mayland, did not carry on any business as brokers in shares; and it was only to transactions by brokers that the provisions of s. 9 applied. Their Lordships cannot accept any of these contentions.

1932 A.C. p. 323.

When the framework of the Act is examined it will be found that after an elaborate definition clause it is divided into five parts. The material definitions are those of broker, which includes every person, other than a "salesman" as defined, who is engaged in the business of "trading" in securities, and "trading" includes the solicitation or obtaining a subscription to any security. "Salesman" includes every person employed by a company to trade in securities. Part I. is entitled "Registration of brokers and salesmen," and provides in substance that no person may trade in securities unless he is registered as a broker or

(1) [1929] A.C. 260.

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salesman. The prohibition is confined to "persons" which by the definition clause does not include corporations. A corporation may however be registered, in which event its officials do not need separate registration. Registration is made subject to the approval of the Attorney-General, who may direct that registration be refused for any reason which he may deem sufficient. Registered persons must enter into a personal bond, and may be required to enter into a surety bond each in the sum of $500, conditioned for payment if the registered person, amongst other events, is (in the former bond) "charged with," (in the later bond) "convicted of," a criminal offence, or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise intra vires, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

1932 A.C. p. 324.

There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded. Incidentally the net has been drawn so wide as to cover the issue of shares by a public company, with the result that a company cannot issue its shares to the public unless for that purpose it employs a registered broker or salesman, or unless the company itself is registered. It is said that these provisions so far as they affect Dominion companies are ultra vires according to the principles adopted by this Board in *John Deere Plow Co.* v. *Wharton* (1); *Great West Saddlery Co.* v. *The King* (2); and *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (3) In those cases there was a general prohibition to companies either to trade at all or to issue their capital unless the company was registered. The

(1) [1915] A.C. 330. (2) [1921] 2 A.C. 91.
(3) [1929] A.C. 260.

legislation was held ultra vires because the legislative powers of the Province are restricted so that "the status and powers of a Dominion company as such cannot be destroyed" (*John Deere Plow Co.* case (1)) and legislation will be invalid if a Dominion company is "sterilized in all its functions and activities" or "its status and essential capacities are impaired in a substantial degree" (*Great West Saddlery Co.* case (2)). It appears to their Lordships impossible to bring this legislation within such a principle. A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the Province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition, as in the *Manitoba* case (3) in 1929; and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilized or its status and essential capacities impaired in a substantial degree.

1932 A.C. p. 325.

Their Lordships have discussed this part of the Act because the attack of the respondents was mainly directed to it, partly because it was said that the pith and substance of the Act was contained in it and that by sterilizing Dominion companies it was inseverably invalid; and partly because it was said that, even if severable so far as registration of Dominion companies was concerned, inasmuch as inquiry could be made under Part II. as to an offence against the Act, an inquiry under Part II. might be directed to an alleged offence invalidly created, and therefore the inquiry provisions of Part II. themselves were invalid. This brings their Lordships to the consideration of Part II., and it will be found that once the main attack on registration has failed there is little to be said against this part of the Act.

(1) [1915] A.C. 330. (2) [1921] 2 A.C. 91.
(3) [1929] A.C. 260.

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Sect. 9, under which the examination in dispute in these proceedings was ordered, empowers the Attorney-General or any delegate appointed by him to examine any person or company in order to ascertain whether any fraudulent act or any offence against the Act or regulations has been, is being, or is about to be committed. The definition of "fraudulent act" appears to be very wide, in some cases having no relation to securities or dealing in securities; and it is possible that if the question becomes relevant a limited construction would be put upon the very general terms used. But this has no bearing upon the question of validity. The examination is not confined to questions of registration, nor are the persons or companies to be examined limited to persons or companies who themselves trade in securities. It seems obvious that the object of the section would be defeated unless the powers of examination extended to persons who might have relevant knowledge, including companies and the officials of companies whose securities might be or be about to be the subject of dealings with the public. The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. There appears to be no reason for excluding Dominion companies from the inquiries of the Attorney-General under this section; and no inconsistency between this legislation and the powers of inquiry under the Dominion Companies Act made on application of members of a company and for a limited purpose—namely, the investigation of the affairs of the company. Their Lordships are unable to agree with the view which was adopted by the Appellate Division that in respect of the subject-matter under discussion the legislature of the Province has only a limited right to require information.

1932 A.C. p. 326.

Part III. of the Act provides for the appointment of auditors to audit the accounts of brokers and to advise the executive committees of stock exchanges in the Province. There appears to be no ground for disputing the validity of these provisions.

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Part IV. by s. 14 contains a provision making it an offence for a broker in certain transactions for customers to place beyond his control securities he may be carrying for customers, and ss. 15 and 16 provide for the necessary records of such transactions. The penal provisions of s. 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 & 21 Geo. 5, c. 11 (Canada), s. 5, which now presumably occupies the field so far as the criminal law is concerned. The substantive provisions of the section avoiding the impugned transaction at the option of the customer and the provisions of the other sections of this part cannot be attacked. Part V. has general provisions which need not be noticed except as to the argument of the respondents founded on the words of s. 20, which provide (inter alia) that any person who does any fraudulent act not punishable under the provisions of the Criminal Code of Canada shall be liable to fine and imprisonment. It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable. In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion companies. The provisions therefore of Part II. of the Act appear to be competent Provincial enactments dealing with property and civil rights and have to be obeyed by persons subject to them.

1932 A.C. p. 327.

In the result the order of the Appellate Division should be set aside and the motion should be dismissed. The respondents must pay the costs here and below.

In the Court below the appellants agreed that if the Court decided in favour of the plaintiffs the motion should be treated as the hearing of the action and that final judgment should be given accordingly. There appears to be no such agreement by the respondents in the event that has happened. Presumably they will so agree, but in the meantime their Lordships can only say that the judgment

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for the plaintiffs should be set aside with the consequences already stated, and the action continue in the Supreme Court, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada, intervener: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J.C.* 1932 Feb. 9.

In re SILVER BROTHERS, LIMITED.

ATTORNEY-GENERAL FOR QUEBEC ..... } APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA ..... } RESPONDENT.

1932 A.C. p. 514.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Interpretation of statute—Crown—Crown debts—Priority—Competing Dominion tax and Provincial tax—Legislative power—Bankruptcy—Taxation—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, heads 3, 21—Interpretation Act (R.S. Can., 1906, c. 1), s. 16

By s. 17 of the (Dominion) Special War Revenue Act, 1915, as amended in 1922 (but since repealed), liability to the Crown for the excise taxes thereby imposed was to rank for payment in priority to all other claims of whatsoever kind save administration expenses. By s. 1357 of the R.S. Queb., 1909, all sums due to the Crown in respect of Provincial taxes are to constitute a privileged debt ranking after law costs. By s. 16 of the Interpretation Act (R.S. Can., 1906, c. 1) no provision in any Act is to affect the Crown unless it is expressly stated therein that the Crown is to be bound thereby.

In a bankruptcy in the Province of Quebec the assets were insufficient to discharge both a sum due for tax under the Dominion statute above mentioned and a sum due for Provincial taxes.

Held, that it would have been competent to the Parliament of Canada under the British North America Act, 1867, s. 91, head 21 (bankruptcy), or head 3 (taxation), to enact the statute of 1915 so as to prejudice the rights of the Province, but that having regard to s. 16 of the Interpretation Act the statute had to be read as though it provided that the priority enacted should not operate so as to diminish any right of the Crown in any Province; the result was that the two debts would run pari passu as claimed by the Province. 1932 A.C. p. 515.

There is only one Crown, but by legislation assented to by the Crown revenue and property vested in the Dominion are distinguished from revenue and property vested in a Province. There are two separate statutory purses; in each the ingathering and expending authority is different.

Att.-Gen. for Quebec v. *Nipissing Central Ry. Co.* [1926] A.C. 715 distinguished.

Judgment of the Supreme Court of Canada [1929] S.C.R. 557 reversed.

APPEAL (No. 135 of 1929) by special leave from a judgment of the Supreme Court of Canada (September 26, 1929), reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (June 28, 1927), which reversed a judgment of the Superior Court.

**Present:*—VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD MERRIVALE, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

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The appeal related to s. 17 of a Dominion statute of 1922 (12 & 13 Geo. 5, c. 47), amending the Special War Revenue Act, 1915 (5 Geo. 5, c. 8); since the present dispute arose the section had been repealed by 15 & 16 Geo. 5, c. 26, s. 9.

The proceedings arose in a bankruptcy in the Province of Quebec. The Dominion claimed that under s. 17 above mentioned, a debt due from the bankrupts for sales tax under the Act of 1915 was entitled to priority over a debt due for Provincial taxes, although by s. 1357 of R.S. Queb., 1906, sums so due were to constitute a privileged debt, ranking immediately after law costs. It was contended by the Province: (1.) that having regard to s. 16 of the Interpretation Act (R.S. Can., 1906, c. 1), the Act of 1915 did not give the Dominion the priority claimed; (2.) that if the Act of 1915 had that effect it was ultra vires under the British North America Act, 1867.

The terms of the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada (Anglin C.J. and Mignault, Newcombe, Lamont and Smith JJ.; Duff and Rinfret JJ. dissenting), reversing the Court of King's Bench for Quebec, held that the claim of the Dominion was entitled to priority over the claim of the Province. The appeal is reported at [1929] Can. S.C.R. 557.

1932 A.C. p. 516.

1931. Dec. 8, 10, 11. *Geoffrion K.C.* and *Hon. Geoffrey Lawrence K.C.* (with them *Maurice Alexander*) for the appellant, the Attorney-General for Quebec. If the effect of s. 17 of the Dominion statute was to give a priority in respect of the Dominion tax, the provision was ultra vires under the British North America Act, 1867. The subject of the enactment was not within the Dominion power as to bankruptcy, though it touches bankruptcy incidentally. The subject was taxation, and was only ancillary to that head. Under s. 1357 of the R.S. Queb., the debt in respect of Provincial taxes had priority over other debts. That has been recognized by the Dominion legislature in s. 51, sub-s. 6, of the Bankruptcy Act. The Provincial power with regard to direct taxation is on an equal footing with the Dominion power of taxation. The principle whereby Dominion legislation overrides Provincial legislation applies only where the Dominion power is

of a more particular nature than that invoked by the Province, and where the two enactments cannot exist side by side. *Royal Bank of Canada* v. *Larue* (1), and other decisions upon that principle, consequently are distinguishable. Further, it is well settled that the power of the Dominion to encroach upon Provincial legislative powers by legislation ancillary to the exercise of an enumerated power arises only if the legislation is necessary to the exercise of that power: *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia.* (2) The provision now in question was not necessary to the imposition of the tax. But even if it was competent to the Parliament of Canada to enact that debts due to the Crown in the right of the Dominion should have priority over debts due to the Crown in the right of the Provinces, s. 17 of the Act of 1915 cannot be so construed, having regard to s. 16 of the Interpretation Act. The words "all other claims" in s. 17 do not include a claim of the Crown in the right of the Province. Although the Crown is indivisible, its powers and rights in Canada are administered by two separate bodies. The British North America Act, 1867, deals with the property and revenues of the Crown so as to distinguish between the Crown in the right of the Dominion and the Crown in the right of a Province. A mere inference from the terms of s. 17 that the legislature intended to enact a priority for the Dominion tax is not sufficient, because s. 16 of the Interpretation Act provides that the rights of the Crown are not to be affected "unless it is expressly stated" that the Crown is to be bound. The two debts should run pari passu. [Reference was made also to *Coomber* v. *Justices of Berkshire* (3) and *Rex* v. *Cook.* (4)]

1932 A.C. p. 517.

Tilley K.C. and *Varcoe K.C.* for the respondent, the Attorney-General for Canada, being called upon only with regard to the question of interpretation. Sec. 16 of the Interpretation Act does not apply. There is only one Crown, and for the purposes of s. 16 the rights of the Crown cannot be split in the manner suggested. In *Att.-Gen. for Quebec* v. *Nipissing Central Ry. Co.* (5) the Board, in construing the expression "Crown lands," held that no distinction could be drawn between the Dominion and

(1) [1928] A.C. 187.
(2) [1930] A.C. 111, 118.
(3) (1883) 9 App. Cas. 61.
(4) (1790) 3 T.R. 519.
(5) [1926] A.C. 715.

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Provincial Crown lands. Except for the suggested distinction s. 17 did not adversely affect the Crown; on the contrary it was advantageous to the Crown. Apart from s. 1357 there was no general priority for Crown debts in the Province of Quebec, which differed in that respect from Provinces where the law was based upon English law; the Civil Code had not that effect: *Exchange Bank of Canada* v. *The Queen*. (1) Further, the rights of the Crown are expressly dealt with. Sect. 17 states that the enactment is "notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law." It is conceded that those words do not include s. 16 of the Interpretation Act, but they included Provincial statutes—*Rex* v. *Canadian Northern Ry. Co.* (2)—with the result that it was expressly stated that the section was to have force notwithstanding s. 1357 of R.S. Queb. Moreover the Bankruptcy Act, 1919, s. 51, sub-s. 6 (now R.S. Can., 1927, c. 11, s. 125), had preserved priorities for taxes given by Provincial statutes, and certain priorities existed under s. 131 of the Bank Act (R.S. Can., 1927, c. 12); the effect of the express words of s. 17 was to sweep away all these priorities. If the appellant is right every Dominion statute should expressly state that it applies to Crown rights in case they are affected, but the decision in *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (3) shows that that is not necessary.

1932 A.C. p. 518.

[*Hon. Geoffrey Lawrence K.C.* The Customs Acts under which the tax was imposed in that case expressly gave power to tax Crown property in a Province.]

Sect. 16 of the Interpretation Act should not be applied so that s. 17 of the Act of 1915 operates differently in different Provinces: *Minister of Finance* v. *Smith*. (4)

Geoffrion K.C. replied.

1932. Feb. 9. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is an appeal from a judgment of the Supreme Court of Canada pronounced on September 26, 1929, allowing an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, dated June 28, 1927.

(1) (1886) 11 App. Cas. 157.
(2) [1923] A.C. 714, 716.
(3) [1924] A.C. 222.
(4) [1927] A.C. 193, 197.

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On December 31, 1923, an order of the Superior Court of the Province of Quebec was made, declaring Messrs. Silver Brothers, Ld., bankrupt.

The Government of the Dominion of Canada duly filed with the trustee in bankruptcy a claim in the sum of $3707.07 for sales tax imposed in virtue of the Special War Revenue Act, 1915, the said tax having become due subsequent to June 28, 1922, the date on which a certain amendment to the Special War Revenue Act—namely, 12 & 13 Geo. 5, c. 47, came into force.

The Government of the Province of Quebec also duly filed with the trustee a claim in the sum of $527.42 for taxes due by the debtor for the years 1921, 1922 and 1923 under the provisions of art. 1345 et seq. of the Revised Statutes of Quebec, 1909, imposing a tax on commercial corporations.

1932 A.C. p. 519.

The moneys realized from the sale of the assets of the insolvent estate, after the payment of costs and expenses of the trustee, amounted to $2353.51, a sum insufficient to pay the two claims aforesaid.

The trustee in his final dividend sheet treated the claim of the Dominion as privileged, according to it the sum of $2353.51 aforesaid in priority to the claim of the Province, and paid over to the Dominion $2000 out of this sum.

The Attorney-General for Quebec filed in the Superior Court a petition disputing the dividend sheet and claiming that the debt due to the Province was privileged as a result of art. 1357 of the Revised Statutes of Quebec, 1909, that the claim of the Dominion was not privileged, and that s. 17 of the Special War Revenue Act as enacted by 12 & 13 Geo. 5, 1922, c. 47, was ultra vires, or that if the said section was intra vires that the claims of the respective Governments were equally privileged and should be paid concurrently.

Sect. 17 of the Special War Revenue Act aforesaid provides as follows: "Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation, for the payment of the excise taxes specified in the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in

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priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets." This provision came into force on June 28, 1922, and remained in force until July 1, 1925, when it was repealed by 15 & 16 Geo. 5, c. 26, s. 9.

Art. 1357 of the Revised Statutes of Quebec aforesaid provides as follows: "All sums due to the Crown in virtue of this section shall constitute a privileged debt ranking immediately after law costs." It came into force in 1906 (6 Edw. 7, Queb., c. 10).

1932 A.C. p. 520.

The petition of the Attorney-General for Quebec was dismissed by Panneton J. on December 3, 1925, on the ground that s. 17 of the Special War Revenue Act aforesaid accorded to the Dominion claim a priority over that of the Province.

The Attorney-General for Quebec appealed to the Court of King's Bench (Appeal Side), which Court (Guerin J. dissenting) on June 28, 1927, set aside the judgment of Panneton J. and ordered that the claims of the two Governments should be treated in the dividend sheet as of the same rank and concurrently.

The Court further recommended that the Government of Canada should repay to the trustee whatever sum that would be required to make up the share of the Province of Quebec according to the revised dividend sheet.

The Attorney-General for Canada thereupon appealed to the Supreme Court of Canada and, on September 26, 1929, the Court, consisting of Anglin C.J. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ., allowed the appeal (Duff and Rinfret JJ. dissenting), and set aside the judgment of the Court of King's Bench and restored the judgment of Panneton J.

The appeal before their Lordships was argued upon two grounds. The first, and it is this which bulks almost exclusively in the judgments of the Courts below, was that on the proper construction of the well known ss. 91 and 92 of the British North America Act the Dominion had no power to enact the s. 17 above quoted so as to prejudice the rights of the Government of the Province of Quebec.

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As to that question their Lordships have no hesitation in preferring the views of the majority of the judges of the Supreme Court.

It would be of no service to go over again the familiar ground of what may be called the competing claims of the two sections and to re-state what has been so often stated. As lately as 1929, in the case of *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia* (1), Lord Tomlin, delivering the judgment of the Board, laid down four propositions regarding the conflict of Dominion and Provincial jurisdiction in terms which need not here at length be repeated. Now, looking at s. 17 and the way it speaks of the preference, it would not be difficult to hold that it was a rule only applicable in bankruptcy. If that is so, then the matter is ended, for bankruptcy is head 21 of s. 91. But let it be assumed that it is rather a natural concomitant of taxation, then the case falls clearly under the fourth proposition laid down in the judgment delivered by Lord Tomlin; it runs thus: "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail." As a matter of fact, this is the textual reproduction of what had been said by Lord Dunedin as long ago as 1907 in the case of the *Grand Trunk Ry. of Canada* v. *Att.-Gen. of Canada*. (2) Now here, so far as taxation itself is concerned, the field is clear. The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash; consequently the Dominion must prevail.

1932 A.C. p. 521.

There was, however, another ground of appeal clearly raised by the reasons of appeal and strenuously insisted upon before their Lordships, and that is based on the effect of s. 16 of the Interpretation Act, 1906, a Dominion Act. That section reads as follows: "16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

(1) [1930] A.C. 111, 118. (2) [1907] A.C. 65.

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1932 A.C. p. 522.

Relying on that section, counsel for the Province says Here is a debt due to His Majesty in Quebec. That debt i an asset of His Majesty, to be applied in Quebec for th purposes of Quebec according to the advice of the Quebe ministers. If the claim of the Dominion is upheld th money to satisfy this debt is swept away into the coffer of the Dominion. Therefore by this statute His Majesty is being bound to the detriment of one of his rights, an there is no express statement in the statute that Hi Majesty is to be so bound.

Unfortunately, this aspect of the case received but scan consideration in the judgments of the Courts below. It i not that it was overlooked. It was clearly stated in th factum for the Province. Duff J., one of the dissentin judges, says: "The Crown is not mentioned and the resul of what I have just said, having regard to the provisions o the Interpretation Act, is that other pecuniary claims o the Crown" (by which he obviously means other than thos created by the Dominion statute itself) "are not prejudice by the priority declared by s. 17." The other dissentin judge, Rinfret J., says: "Mais l'intention de donner à l taxe fédérale préséance sur la taxe provinciale ne résulte pa nécessairement du texte de l'article 17 de Special Wa Revenue Act, 1915. L'intention 'd'y atteindre Sa Majesté n'y est pas 'formellement exprimée' (Loi d'interprétation— S.R.C. 1906—ch. 1, s. 16). Il est à présumer que le légis lateur fédéral a voulu que sa loi sur the Special War Revenu fût comprise conformément à cette prescription de sa propr loi d'interprétation. Il en résulterait que l'art. 17 du Specia War Revenue Act, 1915, ne porte pas 'atteinte aux droit de Sa Majesté' représentée par la Province de Québec, tel qu'ils sont exprimés dans l'article 1357 des Statuts Revisé de Québec, 1909, et que chaque législation doit recevoi son plein effet."

But assuredly the learned judges who formed the majority did not deal with the argument in the serious way whic it demanded if the plea were to be repelled. The sam cannot be said of the argument before their Lordships, fo Mr. Tilley for the Dominion strove most manfully agains the conclusion which was sought to be forced upon him Their Lordships will deal with some at least of hi contentions.

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1932 A.C. p. 523.

His first point had been stated by the learned Chief Justice. Inasmuch as the section says that it is to apply notwithstanding the provisions of the Bank Act and the Bankruptcy Act or "any other statute or law," he says it escapes the provision of the Interpretation Act. Now, first of all, the Interpretation Act is a general Act meant to apply to all future as well as to all present legislation, and their Lordships doubt whether it could be excluded except by special reference. But, apart from that, the Bank Act and the Bankruptcy Act both deal with preferences, and that is the reason why they are particularly mentioned; and it follows that "any other statute or law" must be ejusdem generis; that is to say, dealing with preferences. Their Lordships have accordingly no difficulty in rejecting this contention. It is, perhaps, right here to mention the method in which the learned trial judge got rid of the effect of s. 16, though it was not adopted by any of the judges who formed the majority in the Supreme Court. He says that s. 17 is in a later statute than s. 16, and, therefore, in view of the maxim "posteriora prioribus derogant," s. 16 must give way. But this entirely misses the point that the maxim only applies when the two statutes cannot live together. There is no difficulty in the statute that enacts s. 17 living with the Interpretation Act. The clause of the Interpretation Act is, so to speak, written into every statute. Thus the later statute gives perfectly good priority against all and sundry, but says that this priority does not affect the Crown right in the Province.

Next it was said that inasmuch as the Bank Act and Bankruptcy Act not only dealt with preferences, but (inter alia) with Crown preferences, there is an "irresistible implication" that the Act was meant to deal with all Crown preferences. The simple answer to this is to fix one's eyes on s. 16, and it becomes apparent that it is a contradiction in terms to hold that an express statement can be found in an "irresistible implication."

The next point made was that the provisions of s. 16 do not apply when what is being done is not to affect the Crown prejudicially, but to give a benefit to the Crown, and along with this it is urged that there is only one Crown, and reference is made to the case of *Att.-Gen. for Quebec*

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SILVER BROTHERS, LD., *In re.*

1932 A.C. p. 524.

v. *Nipissing Central Ry. Co.* (1) It is quite true that the section refers to cases where the Crown would be "bound," i.e., subjected to liability, and not to those where the Crown is benefited. But the fallacy lies in the application of this truth to the case in question. Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different. The case above referred to is quite on all fours with this doctrine. What was decided there was that when a statute, which ex hypothesi is intra vires, had said that a railway with consent of the Governor-General could on paying compensation take Crown lands, that meant Crown lands in the Province as well as in the Dominion. It will be at once observed that the point raised here could not be raised there. There was no doubt as to the mention of the Crown, and the only question was one of interpretation. Did the term "Crown lands" mean Crown lands everywhere or only in the Dominion? There was no reason for limiting the interpretation. Crown lands in the Province were just as much Crown lands as Crown lands in the Dominion. The Crown in the Province was not prejudiced. The compensation money would be paid to the Provincial exchequer except in the cases where there was a special purpose or trust under which the lands were vested in the Crown, and in that case there was a special direction under sub-s. 4.

Upon the whole matter, therefore, their Lordships think that the plea of the appellant is good. The effect of s. 16 is, so to speak, to add to the words of s. 17, "but this priority shall not operate against any right in the Crown in a Province, where such right would be diminished by the priority being asserted against it." Whether the strict result of this view should be to give to the Province an overriding priority need not be discussed. Counsel for

1932 A.C. p. 525.

(1) [1926] A.C. 715.

the Province did not ask for such relief; he was content that the two debts should rank pari passu.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, recall the judgment of the Supreme Court, and revert to the judgment of the Court of King's Bench, except so far as it provides for the payment of costs.

As regards costs, although the decisive factor here has been the Interpretation Act, the judgments of the Courts below turned on a consideration of the respective legislative powers of Dominion and Province under the British North America Act. Their Lordships are of opinion that in these circumstances there ought to be no costs awarded as between the Dominion and the Province of the proceedings in any of the Courts in Canada or here, and that any costs already paid under any previous order should be repaid.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

J.C.* 1932 July 28.

[PRIVY COUNCIL.]

CROFT.....APPELLANT;

AND

DUNPHY.....RESPONDENT.

1933 A.C. p. 156.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative power—Scope of authority—Customs duties—Anti-smuggling provisions—Extra-territorial operation—Seizure of Canadian vessel and cargo—Customs Act (R.S. Can., 1927, c. 42), ss. 151, 207—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91.

If a matter is within the legislative authority of the Parliament of Canada under s. 91 of the British North America Act, 1867, the permitted legislation is not limited by any other consideration than is applicable to the legislation of a sovereign State. The authority so conferred upon that Parliament in relation to customs duties extends to enacting anti-smuggling provisions similar in scope to the provisions, operating beyond territorial limits, which had long formed part of Imperial customs legislation, and presumably were regarded as necessary for its efficacy.

Consequently, the Parliament of Canada was competent to provide by ss. 151 and 207 of the Customs Act (R.S. Can., 1927, c. 42, as amended in 1928) that if any vessel registered in Canada was hovering within twelve miles of the Canadian coast, having on board dutiable goods, the vessel and her cargo were to be seized and forfeited.

It was not necessary to determine whether s. 3 of the Statute of Westminster, 1931, by which "it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial effect," was retrospective.

Judgment of the Supreme Court of Canada [1931] S.C.R. 531 reversed.

APPEAL (No. 131 of 1931) by special leave from a judgment of the Supreme Court of Canada (June 30, 1931) reversing a judgment of the Supreme Court of Nova Scotia in banco (May 30, 1930) which affirmed a judgment of Paton J. of that Court.

The respondent's schooner, which was registered in Nova Scotia (where also he resided) together with her cargo, consisting of dutiable goods belonging to the respondent, was seized by the Canadian customs authorities on June 13, 1929, while the vessel was off the coast of Nova Scotia.

1933 A.C. p. 157.

The seizure was made under ss. 151 and 207 of the Customs Act (R.S. Can., 1927, c. 42, as amended by c. 16 of the Statutes of 1928); the provisions in question appear from the judgment of the Judicial Committee.

* *Present:*—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

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The respondent brought an action in the Supreme Court of Nova Scotia against the appellant, the officer of the customs who effected the seizure, alleging that the seizure was illegal and claiming the return of the vessel and cargo, or alternatively their value, and damages for detention.

It was found, and was not contested upon the present appeal or in the Supreme Court of Canada, that the vessel when seized was "hovering" within twelve miles of the coast of Canada.

The Supreme Court of Canada by a majority consisting of Duff and Lamont JJ. (with whose judgment Rinfret J. concurred) held that the legislation was ultra vires having regard to its extra-territorial effect. Newcombe J. (with whose judgment Cannon J. concurred) dissented, holding that the legislation, in its application to the facts of the case, was valid. The appeal is reported at [1931] S.C.R. 531.

1932. July 5, 7, 8. *J. M. Stewart K.C.* and *Frank Gahan* for the appellant. The provisions of the Customs Act relevant to the seizure were intra vires under s. 91 of the British North America Act, 1867, as being for the peace, order, and good government of Canada; the authority was implicit under head 2 (the regulation of trade and commerce) and head 3 (taxation). Both the vessel and her cargo were Canadian. It is clear that the Dominion Parliament had full power to make laws in relation to customs duties, and it is submitted that the authority extended to the provisions in question in this case, as being necessary to make effective legislation on that subject. Before 1867 there had been in the United Kingdom a series of enactments directed against smuggling known as the "Hovering Acts," and operating beyond territorial limits. Provisions of that nature appear in ss. 212 and 217 of the Customs Consolidation Act, 1853, showing that they were treated as part of customs legislation and necessary to it being effective. When in 1867 authority was given to the Dominion Parliament to legislate as to customs the power to enact similar provisions was impliedly included. The authority of the Dominion Parliament under the Act of 1867 to make laws for the peace, order and good government of Canada is not limited territorially save so far as that appears from the Act. The words "of Canada" impose a territorial restriction as to certain classes of subjects. In many cases, however, the powers under s. 91

1933 A.C. p. 158.

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are not so restricted. Under head 4 loans can be, and are, floated in London and New York. Under head 5 postal services beyond territorial limits are in operation. Under head 7 the power as to military and naval services is not confined to Canada: see Military Service Act, 1917, ss. 2, 4, 13, and War Appropriation Act, 1918, s. 2. Under head 8 the High Commissioner and his staff are maintained in London. The Judicial Committee has frequently laid down that the legislative powers conferred by the Act of 1867 are plenary powers as large and of the same nature as those of the Imperial Parliament: *The Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Powell* v. *Apollo Candle Co.* (3); *Riel* v. *The Queen* (4); *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada.* (5) A provision necessary to the efficacy of authorized legislation is not ultra vires although its operation may be extra-territorial: *Att.-Gen. for Canada* v. *Cain.* (6) The decision in *Macleod* v. *Att.-Gen. for New South Wales* (7) was as to the true construction of the enactment in question; the observations towards the end of the judgment as to the territorial restriction of legislative powers were obiter. In any case they should be read in relation to the criminal legislation there in question; they were referred to in the judgment in *Cain's* case. (6) [Reference was made also to *The Ship "North"* v. *The King* (8); *Ashbury* v. *Ellis* (9); *In re Criminal Code* (10); *Rex* v. *Brinkley* (11); *Peninsular & Oriental Steam Navigation Co.* v. *Kingston* (12); and *Case of Leonard Watson.* (13)] Sect. 151, sub-s. 7, of the Customs Act in stating the meaning of "territorial waters of Canada" for the purposes of ss. 151 and 207 was not repugnant to the Territorial Waters Jurisdiction Act, 1878, s. 7, having regard to the terms of that section. Further, by the Statute of Westminster, 1931, "it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation"; having regard to the terms of the section it has retrospective effect.

1933 A.C. p. 159.

(1) (1878) 3 App. Cas. 889, 904.
(2) (1883) 9 App. Cas. 117, 131.
(3) (1885) 10 App. Cas. 282, 289.
(4) (1885) 10 App. Cas. 675, 678.
(5) [1912] A.C. 571, 581.
(6) [1906] A.C. 542.
(7) [1891] A.C. 455.
(8) (1906) 37 Can. S.C.R. 385.
(9) [1893] A.C. 339.
(10) (1897) 27 Can. S.C.R. 461.
(11) (1907) 14 Ont. L.R. 434.
(12) [1903] A.C. 4,1.
(13) (1839) 9 Ad. & E. 731.

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D. A. Cameron K.C. and *Horace Douglas* for the respondent. The Parliament of Canada being a subordinate legislature, in the sense that its authority is derived, its power to make laws for the peace, order, and good government of Canada, prima facie at least, is restricted territorially: *Macleod* v. *Att.-Gen. for New South Wales.* (1) A comparison of that case with *The Trial of Earl Russell* (2) shows the distinction between the power of the Imperial Parliament and that of a subordinate legislature. In *Macleod's* case (1) no doubt the legislation in question was of a criminal nature, but here it is penalizing. The restriction applies particularly to laws relating to taxation, as this does: *Commercial Cable Co.* v. *Att.-Gen. of Newfoundland* (3); *Pass* v. *British Tobacco Co. (Australia).* (4) Even if some of the heads of s. 91 of the British North America Act, 1867, appear by necessary intendment to confer extra-territorial power that does not show a similar intention as to laws relating to customs duties. No inference to that effect can properly be drawn from legislation passed in Canada in the exceptional circumstances of the war. The principle of necessary intendment should not readily be applied so as to affect liberty or property: *Fenton* v. *Hampton.* (5) It was not shown that a power to seize Canadian vessels within twelve miles of the coast was necessary to the efficacy of the provisions of the Act. The Act contained in ss. 11 and 203 provisions to prevent and punish smuggling; if a power of seizure at sea was necessary it should have been confined to vessels within the three mile limit. Apart from territorial restriction no provision is valid as being ancillary to legislation expressly authorized by the British North America Act, 1867, unless it is necessary to make the legislation effective: it is not sufficient that it is desirable or convenient: *City of Montreal* v. *Montreal Street Ry.* (6); dissenting judgment of Duff J. in *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry., etc., Co.* (7), approved by the Board on appeal. (8) In the absence of materials necessity for efficacy should not be assumed: *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia.* (9)

1933 A.C. p. 160.

(1) (1891) A.C. 455.
(2) [1901] A.C. 446.
(3) [1912] A.C. 820, 826.
(4) (1926) 42 Times L.R. 771.
(5) (1858) 11 Moo. P.C. 347, 360.
(6) [1912] A.C. 333.
(7) (1913) 48 Can. S.C.R. 98, 122.
(8) [1914] A.C. 1067.
(9) [1930] A.C. 111, 121, 122.

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Sir Thomas Inskip A.-G. (with him *Wilfrid Lewis*) appeared upon notice from the Judicial Committee. He stated that he did not think it necessary to intervene in the appeal, having regard to s. 3 of the Statute of Westminster, 1931, whether or not that section was retrospective in effect.

July 28. The judgment of their Lordships was delivered by

LORD MACMILLAN. On June 10, 1929, the schooner *Dorothy M. Smart* sailed for "the high seas" from the French island of St. Pierre with a cargo on board of rum and other liquors, which are dutiable under Canadian law. The vessel was registered in Nova Scotia, and with her cargo was the property of the respondent, who is resident in Nova Scotia. On June 13, 1929, the schooner, when at a distance of 11½ miles from the coast of Nova Scotia, was boarded by the appellant, an officer in the Customs service of the Canadian Government. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port.

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 & 19 Geo. 5, c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

1933 A.C. p. 161.

The enactments impugned are contained in ss. 151 and 207 of the statute as amended. Sect. 151 provides as follows: "(1.) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port. . . . (7.) For the purposes of this section and section two hundred and seven of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Sect. 207 enacts as follows: "(1.) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her . . . . cargo shall be seized and forfeited . . . ."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of twelve miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the Customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five judges of the Supreme Court of Nova Scotia en banco. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Duff, Rinfret and Lamont JJ., Newcombe and Cannon JJ. dissenting. The matter now comes before their Lordships on the defendant's appeal.

1933 A.C. p. 162.

It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in *The Le Louis* (1): "Maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations

(1) (1817) 2 Dod. Adm. 210, 245.

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more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination." This special latitude of legislation in such matters is a familiar topic in the text-books on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265 that a state in matters or revenue and health "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports." In Halleck's "International Law," 4th ed., vol. i., p. 168, it is pointed out that beyond the generally accepted limits of territorial waters "states may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts.'" Again, in Hall's "Foreign Powers and Jurisdiction of the British Crown," it is stated in para. 108, p. 244, that "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested." Without further multiplying quotations it may be sufficient to add references to Phillimore's "International Law," vol. i., para. 198, and Wheaton's "International Law," 6th ed., vol. i., p. 367.

1933 A.C. p. 163.

But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.

In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason

to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

In the well-known case of *The Queen* v. *Burah* (1) Lord Selborne, in expressing the views of the Board in the comparable instance of India, uses this very significant language: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself." Again, speaking of the Provincial legislature of Ontario, Sir Barnes Peacock, in giving the judgment of this Board in *Hodge* v. *The Queen* (2), said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow." To the Dominion Parliament these words apply a fortiori, with the substitution of s. 91 for s. 92. Their Lordships also recall the language used by Lord Halsbury L.C. in expressing the views of the Board on the power of the Dominion Parliament to legislate for the peace, order and good government of Canada, in the case of *Riel v. The Queen*. (3) "The words of the statute," said his Lordship, "are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."

1933 A.C. p. 164.

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires: per Lord Justice-General Dunedin in *Mortensen* v. *Peters*. (4) It may be that legislation of the Dominion

(1) 3 App. Cas. 889.
(2) 9 App. Cas. 117, 132.
(3) 10 App. Cas. 675, 678.
(4) (1906) 8 F. (J.C.) 93, 101.

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Parliament may be challenged as ultra vires on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. The question is a domestic one between the Imperial Parliament and the Dominion Parliament.

1933 A.C. p. 165.

When in the course of the hearing it became clear that this was the nature of the controversy, their Lordships deemed it proper that intimation should be made to His Majesty's Attorney-General in order that he might, if so advised, intervene on behalf of the Imperial Government. The Attorney-General attended at their Lordships' bar and stated that, having considered the issue raised in the case, he did not deem it his duty to offer any argument on the matter. It may therefore be taken that the appellant's contention in support of the validity of this Canadian legislation is not regarded as contrary to any Imperial interest. This of course does not affect in any way the pure question of law arising on the interpretation of the British North America Act, as that question has been defined above.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes: *Royal*

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Bank of Canada v. *Larue*. (1) Now from early times the customs legislation of the Imperial Parliament has contained anti-smuggling provisions authorizing the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits. So far back as 1768 there is to be found in the statute 9 Geo. 3, c. 9, s. 22, legislation authorizing the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by s. 179, authorized the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the coast. The previous Imperial Act of 1853 (16 & 17 Vict. c. 107), which was in force when the British North America Act was passed, dealt, in s. 212, with even greater distances from the coast. It is not without interest to note as a matter of history that the risk of illicit trade between the French island of St. Pierre and His Majesty's North American possessions was the subject of special legislation in a statute of 1763, 4 Geo. 3, c. 15, by s. 35 of which any British ship "hovering" within two leagues of St. Pierre and Miquelon might be seized and forfeited.

It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive

(1) [1928] A.C. 187.

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that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy: cf. *Att.-Gen. for Canada* v. *Cain.* (1) The British North America Act imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not in pari materia.

Their Lordships' attention was drawn to s. 3 of the Statute of Westminster, 1931, by which it is "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation," and it was suggested that this section had retrospective effect. In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

The result is that their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court of Canada reversed, and the judgment of the Supreme Court of Nova Scotia restored. The appellant will have the costs of the appeal and in the Supreme Court of Canada.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Lawrence Jones & Co.*

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(1) [1906] A.C. 542.

[PRIVY COUNCIL.]

J.C.* 1932 Nov. 10.

1933 A.C. p. 168.

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE..... } APPELLANTS;

AND

CRYSTAL DAIRY, LIMITED.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Legislative power—Taxation—Adjustment of profits between traders—Levies on dairy farmers—Agriculture—Dairy Products Sales Adjustment Act, 1929 (Stat. of B.C., 1929, c. 20)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 2; s. 95.

Because it was more profitable to dairy farmers in British Columbia to sell their milk in a fluid form than to sell products manufactured from it, the market for fluid milk became glutted. As a remedy the Provincial legislature passed the Dairy Products Sales Adjustment Act, 1929 (amended in 1930 and 1931), authorizing the appointment of an Adjustment Committee in any district in which the dairy farmers petitioned for one. Where a Committee was appointed the farmers had to make returns to it, and a farmer selling fluid milk had to pay to the Committee a levy assessed according to the quantity he had sold; the total of these levies, which together made up the difference in value of the milk disposed of in the two forms, was to be apportioned by the Committee among the farmers who had sold milk products. The expenses of the Committee were to be met by a further levy on the farmers. Both levies were recoverable as debts.

Held, that both levies were taxes, and, as they would tend to affect the price of commodities, they were indirect taxes, and the Act was therefore ultra vires the Province having regard to s. 91, head 3, and s. 92, head 2, of the British North America Act, 1867; it was unnecessary to determine whether the Act was invalid also under s. 91, head 2, as being for the regulation of trade and commerce. The Act was not in relation to agriculture so as to be within s. 95.

Workmen's Compensation Board v. *Canadian Pacific Ry. Co.* [1920] A.C. 184 distinguished.

Judgment of the Court of Appeal of British Columbia affirmed.

APPEAL (No. 28 of 1932) from a judgment of the Court of Appeal of British Columbia (January 5, 1932) affirming a judgment of Murphy J. (September 6, 1931).

The appellants brought an action against the respondents in the Supreme Court of British Columbia for a mandamus directing the respondents to make to them certain returns in accordance with the Dairy Products Sales Adjustment

1933 A.C. p. 169.

* *Present:*—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

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Act, 1929 (Stat. of British Columbia, 1929, c. 20), as amended by c. 13 of 1930, and c. 14 of 1931. The respondents by their defence pleaded that the above legislation was ultra vires the Provincial legislature under the British North America Act, 1867.

The effect of the legislation in question appears from the judgment of the Judicial Committee.

The Court of Appeal of British Columbia, affirming the judgment of the trial judge, held that the legislation was ultra vires on the ground that the levies imposed by the Act were taxes, and the taxation was not direct so as to be valid under s. 92, head 2, of the Act of 1867.

1932. July 11, 12, 14, 15, 18. *Maitland K.C.* and *Frank Gahan* for the appellants. The Act was intra vires the Provincial legislature under the British North America Act, 1867, s. 92, head 13 (property and civil rights), and head 16 (local and private matters); the appellants rely also upon s. 95, which authorizes laws as to agriculture in the Province. The levies were not taxes. The Act of 1867 uses the word "taxation" to mean imposts to replenish the revenue of the Dominion or a Province; that agrees with the meaning of "tax" according to English cases: *Brewster* v. *Kidgill* (1); *Baker* v. *Greenhill* (2); *Att.-Gen.* v. *Wilts United Dairies, Ld.* (3), affirmed by the House of Lords. (4) The levies were merely part of a scheme for pooling the profits in a Provincial trade, without assistance from, or benefit to, the Provincial exchequer. The levies were for services rendered, and for that reason also were not taxes: *Cotton* v. *The King.* (5) In *Lawson* v. *Interior, etc., Committee of Direction* (6) the legislation was invalid because its purpose was beyond the powers of the Provincial legislature. If, however, the levies were taxes they were direct taxation falling upon the farmers: *In re Validity of Manitoba Act* (7), affirmed by the Board, *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (8) No tendency to pass the levies on to consumers was shown, nor is that necessarily the true test: *Halifax Corporation* v. *Fairbanks' Estate.* (9) If the levies were taxes they were direct taxation, as in the

1933 A.C. p. 170.

(1) (1697) 12 Mod. 166.
(2) (1842) 3 Q.B. 148, 163.
(3) (1921) 124 L.T. 319, 322.
(4) [1922] W.N. 217.
(5) [1914] A.C. 176, 195.
(6) [1931] S.C.R. 357.
(7) [1924] S.C.R. 317, 322.
(8) [1925] A.C. 561.
(9) [1928] A.C. 117.

case of the contributions considered in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1) That case is not an authority that the levies were taxes, because there the contributions were paid into the Provincial revenue. Further, the levies could be assessed upon the dairy farmers under s. 92, head 9, of the Act. An impost under that head may be direct or indirect taxation: *Lawson* v. *Interior, etc., Committee of Direction.* (2) That view was mentioned in *Att.-Gen. for Quebec* v. *Reed* (3) without a decision whether or not it was correct. The Dominion Parliament could not validly have passed the Act now in question: *In re Board of Commerce Act, 1919* (4); *Toronto Electric Commissioners* v. *Snider.* (5)

Tilley K.C. for the respondents. The levies were compulsorily imposed under statutory powers for a public purpose, and were recoverable by action; they were therefore taxes: *City of Halifax* v. *Nova Scotia Car Works Ld.* (6); *Cité de Montréal* v. *Ecclésiastiques du Séminaire de St-Sulpice* (7); *Lawson* v. *Interior, etc., Committee of Direction.* (8) There would be a tendency to pass on the levy; the Act contemplated a rise in prices. The taxation therefore was indirect, and the Act invalid: *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (9) and cases there referred to; *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (10) In *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1) the Act did not impose a tax upon a commodity; although the contributions under the Act there considered were paid into the Provincial revenue they were allocated, as in this case, to a particular purpose. The Act was also invalid, because, as was held in *Lawson's* case (11) with regard to the Act there in question, it conflicted with the power of the Dominion Parliament under s. 91, head 2, to regulate trade and commerce. The manufactured products passed outside the Province in the course of trade, and the dairy farmers selling fluid milk were assessed for the benefit of the exporters of milk products. The power under s. 91, head 2, has been rather overlooked. Where that power overlaps

1933 A.C. p. 171.

(1) [1920] A.C. 184.
(2) [1931] S.C.R. 357, 363, 364.
(3) (1884) 10 App. Cas. 141, 144.
(4) [1922] 1 A.C. 191.
(5) [1925] A.C. 396.
(6) [1914] A.C. 992.
(7) (1889) 14 App. Cas. 660.
(8) [1931] S.C.R. 357, 362.
(9) [1927] A.C. 934.
(10) [1930] A.C. 357.
(11) [1931] S.C.R. 357.

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the Provincial power under head 13 of s. 92, the Dominion power prevails. A Province cannot legislate to regulate a trade which may pass outside the Province; nor can the power to impose direct taxation be used as a method of regulating a trade. The civil rights referred to in s. 92, head 13, are personal rights in the Province. The judgments of the Board dealing with the conflict between s. 91, head 2, and s. 92, heads 13 and 16, do not support the view that a Province can legislate so as to deal with trade as trade. [Reference was made to *Citizens Insurance Co.* v. *Parsons* (1); *Bank of Toronto* v. *Lambe* (2); *John Deere Plow Co.* v. *Wharton* (3); *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* (4); *Board of Commerce Act, 1919* (5); *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada.* (6)] Further, the Act is invalid, because it is repugnant to, and unworkable with, the Combines Investigation Act (R.S. Can., 1927, c. 26), which the Board held to be valid in the case last mentioned. For that reason, as well as having regard to its provisions, the Act is not within s. 95.

Maitland K.C. in reply. The trade dealt with by the Act was a Provincial trade, and there is no decision of the Board that a Provincial legislature cannot deal with a trade of that nature. If the adjustment levy was not a tax then the expenses levy was valid as being merely ancillary to competent legislation.

1933 A.C. p. 172.

Nov. 10. The judgment of their Lordships was delivered by

LORD THANKERTON. This appeal arises out of an action by the appellants for a mandamus commanding the respondents, as a "distributor" as defined by s. 2 of the Dairy Products Sales Adjustment Act, being c. 20 of the Statutes of British Columbia, 1929, as amended by the Statutes, 1930, c. 13, and 1931, c. 14 (hereinafter called "the Act of 1929"), to make forthwith to the appellants, an incorporated Committee appointed under the Act of 1929, returns of all milk or manufactured products purchased or received by the respondents from dairy farmers as defined by the Act and for damages.

The action was brought in the Supreme Court of British Columbia, and is contested by the respondents on the

(1) (1881) 7 App. Cas. 96.
(2) (1887) 12 App. Cas. 575.
(3) [1915] A.C. 330.
(4) [1916] 1 A.C. 588.
(5) [1922] 1 A.C. 191.
(6) [1931] A.C. 310.

ground that the Act of 1929 is ultra vires and beyond the competence of the legislature of the Province of British Columbia.

The case was tried by Murphy J., who gave judgment on September 26, 1931, dismissing the action. On an appeal by the present appellants, the Court of Appeal of British Columbia affirmed the judgment of Murphy J. on January 5, 1932, and the appellants now appeal from that judgment.

Sect. 3 of the Act of 1929 authorizes the Lieutenant-Governor in Council, upon a petition supported by 66 per cent. of the dairy farmers present at a meeting held in terms of s. 4, to appoint an Adjustment Committee, in such portion of the Province as may be set forth in the order, to ascertain and apportion between the dairy farmers the returns received from the sale of milk on the fluid market and the sale of manufactured products, which are defined as any product manufactured wholly from, or derived by any form of treatment from, milk.

The appellant Committee were so appointed in 1929 for the Lower Mainland District of the Province. The chief market for disposal of fluid milk in that district is in the Cities of Vancouver and New Westminster.

It is common ground that disposal of milk in its fluid form affords a better return to the dairy farmer than its disposal in manufactured form, and, as the Act makes clear, the purpose of the legislature was to relieve congestion in the fluid milk market, caused by a shortage of demand. Broadly stated, this object is attained by the Committee fixing monthly the standard prices for fluid milk and manufactured products respectively and the weight and quantity of each sold or disposed of by all the farmers in the district, based on returns compulsorily obtained from them, and thereafter apportioning the difference between the total value of the sales of each, calculated at the respective standard prices, over the whole body of farmers, in proportion to the weight of fluid milk sold or disposed of by each farmer. Each farmer is then bound to contribute his share of the apportionment to the Committee, who apportion and pay the total amount so received to the farmers who have sold or disposed of the manufactured products. This contribution by the farmers is hereinafter called the "adjustment levy."

1933 A.C. p. 173.

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The expenses of the Committee are met by a compulsory levy collected from the farmers, hereinafter called the "expenses levy."

The adjustment levy and the expenses levy are both recoverable by the Committee as a debt (s. 11), and the Committee may also require from the farmer an order for their amount on the purchaser of the farmer's milk or manufactured products (s. 9 (*g*)).

The main question at issue between the parties is whether the imposition of these levies, or either of them, involves taxation within the meaning of ss. 91 and 92 of the British North America Act, 1867, and, if so, whether they constitute direct taxation within the meaning of s. 92, head 2, of the Act. Both the Courts below have held that both these levies are taxes and do no constitute direct taxation, and that the legislation is ultra vires of the Province. M. A. Macdonald J. felt bound by the decisions to hold, contrary to his personal view, that the adjustment levy was taxation and indirect; while holding that the expenses levy was an indirect tax, he doubted whether on that ground alone the whole Act would have to be regarded as ultra vires.

1933 A.C. p. 174.

In the first place, it is clear, in the opinion of their Lordships, that the substantive provision of the Act of 1929 is to transfer compulsorily a portion of the returns obtained by the traders in the fluid milk market to the traders in the manufactured products market; the other statutory provisions afford the machinery by which this is enabled to be done. The decision of this appeal turns mainly, if not entirely, on whether such a compulsory transfer is within the legislative competence of the Province.

The appellants based their contention that the Act is intra vires of the Province (*a*) on head 13 of s. 92 of the Act of 1867—"property and civil rights in the Province"; (*b*) on head 16—"Generally, all matters of a merely local or private nature in the Province," and (*c*) on s. 95 of the Act of 1867, which empowers the legislature in each Province to make laws in relation to agriculture in the Province, so long as they are not repugnant to any existing law of the Dominion Parliament.

The respondents founded (*a*) on head 3 of s. 91 of the Act of 1867, claiming that the Act of 1929 operated as taxation, and was not direct taxation, which is lawful to the Province under head 2 of s. 92 of the Act of 1867; (*b*) that the Act of 1929 was an attempt to regulate trade in infringement of the reservation of trade and commerce to the Dominion under head 2 of s. 91 of the Act of 1867; and (*c*) that it dealt with the merchanting of commodities and was not local in its operation, and was repugnant to existing legislation as to trade combines.

In the first place, the contention of the appellants that the Act of 1929 is a law relating to agriculture under s. 95 of the Act of 1867 may be disposed of as untenable, for the Act of 1929 does not appear in any way to interfere with the agricultural operations of the farmers, and s. 21 of the Act expressly prohibits the Committee from fixing prices at which milk or manufactured products may be sold, and from directing in what quantity, to whom or when milk or manufactured products may be sold or disposed of by a dairy farmer.

1933 A.C. p. 175.

The main issue of this appeal is whether the adjustment levies are taxes, and, if so, whether they are direct taxes. If both these questions are to be answered affirmatively, it matters not that they incidentally affect property and civil rights in the Province, for taxation necessarily has that effect, and the closing words of s. 91 will exclude any operation of para. 16 of s. 92. In that event it would be unnecessary to consider the remaining contentions of the respondents.

In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s. 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be prima facie evidence in all Courts that such amount is due by the dairy farmer (s. 11). A dairy farmer who fails to comply with every determination, order or regulation made by a Committee

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under the Act is to be guilty of an offence against the Act (s. 13), and to be liable to a fine under s. 19. Compulsion is an essential feature of taxation: *City of Halifax* v. *Nova Scotia Car Works Ld.* (1) Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s. 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interest of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s. 12, sub-s. 2, and s. 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made. The district here affected is a considerable part of the whole Province, but the Act might have still wider application within the Province. While not saying that these elements are exhaustive of the elements which might be found in other cases to point to the same conclusion, their Lordships are of opinion that they are sufficient to characterize the adjustment levies in the present case as taxes. Somewhat similar considerations led Duff J. to the same conclusion as regards the levy for expenses in *Lawson's* case (2), though the other members of the Court do not appear to have found it necessary to express any opinion on that ground of judgment, the main ground of decision being on "the regulation of trade and commerce."

1933 A.C. p. 176.

It seems to follow that the expenses levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes.

The principles on which taxes are to be classified as direct or indirect are now well established by decisions of this Board, which it is quite unnecessary to recapitulate. They are summarized in *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (3) The adjustment levies are imposed on traders in the fluid milk market in proportion to the weight sold or disposed of by each of them calculated at the standard price; the expenses levies are imposed

(1) [1914] A.C. 992, 998. (2) [1931] S.C.R. 357, 362.
(3) [1927] A.C. 934, 937.

"on milk and (or) manufactured products sold or disposed of." In effect, both levies are imposed on the sale of commodities by the persons taxed, and, in their Lordships' opinion there can be little doubt that such taxes have a tendency to enter into and affect the price which the taxpayer will seek to obtain for his commodities, as is the case with excise and customs. That tendency is likely to be enhanced in the present case by the limitation of competition among the dealers in the fluid milk market, which seems to follow from the compensating bonus given to those who deal in the less remunerative market for manufactured products.

The distinction between the present class of tax and that class of direct tax of which the assessments for the workmen's compensation fund were an example (*Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1)) is pointed out in the judgment of the Board in that case. Lord Haldane, in delivering the judgment, says: "Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for Provincial purposes. In *Bank of Toronto* v. *Lambe* (2) it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business."

1933 A.C. p. 177.

The tax in that case was assessed according to the amount of the employers' pay-rolls. The tax here is imposed on the proceeds of particular transactions. Their Lordships are of opinion that both the levies here are indirect taxes. It is therefore unnecessary to consider the remaining contentions of the respondents.

Their Lordships are therefore of opinion that the Act of 1929, as amended, was not within the legislative competence of the Province, and that the decision of the Courts below was correct. They will humbly advise His Majesty

(1) [1920] A.C. 184, 190. (2) 12 App. Cas. 575.

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that the judgment appealed from should be affirmed and that the appeal should be dismissed.

In accordance with an arrangement between the parties there will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

J.C.* 1933 April 10.

CONSOLIDATED DISTILLERIES, LIMITED, AND ANOTHER..... } APPELLANTS;

1933 A.C. p. 508.

AND

THE KING.....RESPONDENT.

[AND CONNECTED APPEALS]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Exchequer Court—Jurisdiction—Revenue—Export bond—Goods withdrawn from bonded warehouse—Action on bond—Conditions of bond—Satisfaction of collector—Fabricated documents—Exchequer Court Act (R.S. Can., 1927, c. 34), s. 30—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 101.

Sect. 30 *(d)* of the Exchequer Court Act of Canada, which provides that that Court shall have original jurisdiction "in all other actions and suits of a civil nature . . . . in which the Crown is plaintiff or petitioner," should be read, in view of the preceding sub-sections, as confined to actions and suits in relation to some subject-matter in regard to which legislation is within the competence of the Dominion. So read the provision is intra vires under s. 101 of the British North America Act, 1867, and gives the Exchequer Court jurisdiction in an action by the Crown upon a bond entered into pursuant to the Inland Revenue Act of Canada upon the withdrawal of goods from a bonded warehouse for the purpose of export.

Upon the true construction of the printed departmental form of bond used in those circumstances the bond becomes void if the obligor accounts for the goods to the satisfaction of the collector of inland revenue. That condition is performed where the collector, acting upon apparently genuine official documents certifying the landing of the goods at the foreign port, has cancelled the bond by making an entry in his book of record, even if, without the knowledge of the collector or the obligor, the documents have been fabricated.

Judgment of the Supreme Court of Canada [1932] S.C.R. 419 affirmed as to jurisdiction, but reversed as to liability on the bonds.

CONSOLIDATED APPEALS (No. 80 of 1932) by special appeal from three judgments of the Supreme Court of Canada (March 15, 1932) affirming three judgments of the Exchequer Court (March 13, 16, 17).

Each of the three actions giving rise to the consolidated appeals was brought by the Crown in the Exchequer Court of Canada on a bond or bonds given by the respective appellants to the Crown in 1924 pursuant to the Inland Revenue Act (R.S. Can., 1906, c. 51), and the regulations

1933 A.C. p. 509.

* *Present:*—LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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made thereunder, in respect of cases of spirits withdrawn from a bonded warehouse in Ontario for the purpose of export. The penal sum named in each bond was double the amount of the excise duty which would have been payable on the goods, the total penalties under the twelve bonds sued on being $587,400.

Two questions arose upon the present appeal: (1.) Whether the Exchequer Court had jurisdiction in the actions; (2.) whether the liability of the appellants upon the bonds had been discharged. A further question—namely, whether the appellants, if liable, were liable for the full amount of the sums named in the bonds, was dealt with in the Courts in Canada, but a decision in the present appeal became unnecessary.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada (Anglin C.J. and Duff, Rinfret and Lamont JJ.), affirming the judgment of Maclean J. in the Exchequer Court, held that the Exchequer Court had jurisdiction in the actions, and that the present appellants were liable to the full amounts stated in the bonds. The proceedings in the Supreme Court are reported at [1932] S.C.R. 419; those in the Exchequer Court at [1931] Ex. C.R. 85.

1933. March 20, 21, 23. *Tilley K.C.* and *Horace Douglas* for the appellants. On the true construction of the bonds they were to be void if the appellant company "shall account for the goods to the satisfaction of the collector." That alternative condition was performed. The evidence shows that the collector accepted the documents as proving that the spirits had been landed at the foreign port. He cancelled the bonds within the time provided for cancellation by regulation 17. If there was any fraud in connection with the documents, it was not shown that the appellants were parties to it. Under R.S. Ont., 1927, c. 107, s. 30, the landing certificates are to be presumed to have been correct. The bonds, having been cancelled pursuant to the regulations, afforded no cause of action.

1933 A.C. p. 510.

Further, the Exchequer Court had not jurisdiction to try the actions. The appellants concede that under s. 101 of the British North America Act, 1867, the Parliament

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of Canada had power, ancillary to its power as to excise, to confer jurisdiction to enforce the bonds, but s. 30 of the Exchequer Court Act has not that effect. The actions were not "to enforce any law of Canada" so as to be within s. 30 (*a*); they were to enforce civil obligations. So far as s. 30 (*d*) would appear to confer jurisdiction in the actions it was ultra vires. Having regard to s. 92, heads 13 and 14, it was not competent to the Dominion Parliament to confer jurisdiction to try actions to enforce civil obligations in a Province: *Consolidated Distilleries* v. *Consolidated Exporters Corporation.* (1) The principle applied in *Att.-Gen.* v. *Walker* (2) and *Reg.* v. *Finlayson* (3) that the Crown can sue in any Court is subject to the statutory jurisdiction of the Court.

In any case the appellants were not liable on the bonds for more than the loss or damage actually sustained by the revenue; neither the Inland Revenue Act nor the regulations provided for bonds for penal sums: *Clark* v. *Barnard* (4); *U.S.* v. *Zerbey.* (5) [Reference was made also to *Carling Export Brewing and Malting Co.* v. *The King.* (6)]

Rowell K.C. and *Frank Gahan* (with them *Plaxton K.C.*) for the appellants. By s. 101 of the British North America Act, 1867, the Parliament of Canada had power to establish additional Courts "for the administration of the laws of Canada," which includes all laws then in force, whether Imperial, Dominion or Provincial, and the power is expressed to be "notwithstanding anything in this Act." The power under s. 101, therefore, was not subject to the Provincial powers under s. 92: *Valin* v. *Langlois.* (7) If there is an overlapping of the powers of the Dominion and the Province the former prevails: *Crown Grain Co.* v. *Day* (8); *In re Silver Brothers, Ld.* (9) The bonds being the property of the Dominion, the Dominion had exclusive power to legislate as to the method of enforcing them: *Burrard Power Co.* v. *The King.* (10) Sect. 30 (*d*) of the Exchequer Court Act, therefore, was intra vires, even if its words are given the widest interpretation. Further, there is a presumption that the Parliament of Canada intended

1933 A.C. p. 511.

(1) [1930] S.C.R. 531.
(2) (1877) 25 Grant, 233.
(3) (1897) 6 Ex. C.R. 202.
(4) (1883) 108 U.S. 436.
(5) (1926) 271 U.S. 332.
(6) [1931] A.C. 435.
(7) (1879) 5 App. Cas. 115.
(8) [1908] A.C. 504.
(9) [1932] A.C. 514, 521.
(10) [1911] A.C. 87.

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to legislate within its powers, and the section should be so interpreted if possible: *Macleod* v. *Att.-Gen. for New South Wales* (1); *Att.-Gen. for Canada* v. *Cain* (2); *Att.-Gen. for Ontario* v. *Reciprocal Insurers.* (3) Having regard to the matters dealt with in the section, sub-s. (*d*) can be construed as confined to matters within the legislative power of the Dominion. *Consolidated Distilleries* v. *Consolidated Exporters Corporation* (4) is distinguishable; it related to a third party proceeding, and the judgments recognized that the Exchequer Court had jurisdiction in an action by the Crown to enforce an excise bond. The Court had jurisdiction also under s. 30 (*a*), because the bonds having been given in compliance with a law of Canada, actions to enforce them were actions to enforce that law.

Upon the true construction of the bonds they were to be void only if the goods were exported and entered at the named port. Having regard to ss. 68 and 140 of the Inland Revenue Act, and regulations 16 and 17, that was the essential condition of the bonds. The words relied on for the appellants did not form an alternative condition, but merely a method of proof. The documents were concurrently found to be fraudulent and the cancellations made, acting upon them, were unauthorized and inoperative.

1933 A.C. p. 512.

The appellants were liable to the full amount of the bonds, even if no fraud on their part was proved: *Rex* v. *Dixon.* (5)

Tilley K.C. in reply. The legislative power of the Dominion under s. 91, head 1, of the British North America Act, 1867, with regard to "the public debt and property" does not extend to all property which it may acquire.

April 10. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. These are three appeals (consolidated into one) from three judgments of the Supreme Court of Canada affirming the judgments of the Exchequer Court of Canada delivered in three actions which had been brought by the Crown for the purpose of recovering moneys alleged to be due under certain bonds executed by the appellants in favour of the Crown in

(1) [1891] A.C. 455.
(2) [1906] A.C. 542.
(3) [1924] A.C. 328.
(4) [1930] S.C.R. 531.
(5) (1822) 11 Price 204.

the circumstances hereinafter mentioned. The appellants Hume and King are parties to all or some of the bonds, but where subsequently used in this judgment the word "appellants" refers to Consolidated Distilleries, Ld. only.

The bonds in question were given in pursuance of the provisions of the Inland Revenue Act (R.S. Can., 1906, c. 51) and the regulations thereunder, in respect of the export of certain spirits which had, pursuant to s. 61 of the said Act (hereinafter referred to as "the Revenue Act"), been deposited in an excise bonding warehouse at Belleville, Ontario, and on which, accordingly, no excise duty had been paid.

The relevant provisions of the Revenue Act in regard to the export from Canada of spirits so deposited are ss. 58, 68, 140 and 142, which run thus:—

"58. No goods, subject to a duty of excise under this Act, shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, licensed as herein provided, or from any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required.

68. Goods warehoused under this Act may be transferred in bond, and may be exported or removed from one warehouse to another, without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary.

1933 A.C. p. 513.

140. The Governor in Council may make such regulations for the warehousing and for the ex-warehousing, either for consumption, for removal, for exportation, or otherwise, of goods subject to a duty of excise, and for giving effect to any of the provisions of this Act and declaring the true intent thereof in any case of doubt as to him seems meet.

142. All regulations made under this Act, whether made by the Governor in Council or departmental, shall have the force of law, and any violation of any such regulation shall subject the holder of a licence under this Act, or any other person in the said regulations mentioned, to such penalty or forfeiture as is, by the said regulations, imposed for such violation, and the same shall be enforced in like manner as other penalties and forfeitures imposed by this Act."

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Certain regulations appear to have been made, which were approved by Orders in Council and which contain the following provisions:—

"15. Entry of goods ex-warehouse for exportation must be made on the forms sanctioned by the department, and must contain an exact specification of the goods intended for exportation: see s. 10. With every such entry, an export bond shall be taken in the prescribed form.

16. Export bonds shall be conditioned for the due delivery of the goods bonded at the place designated in the entry within a specified time, which time in any case shall not exceed the time usually necessary for the performance of the voyage or journey by the conveyance adopted (allowing a reasonable time for detention within the discretion of the collector) and for returning the vouchers by the next mail; and in no case shall the period allowed for the cancellation of the export bond exceed six months unless special authority has been granted by the department.

17. . . . . In all cases where the exportation out of Canada is by a bonded railway, or by a vessel clearing for a port outside of Canada and plying on a published route and schedule, with first port of call a port outside of Canada, such evidence of exportation of the goods as is above herein provided for, shall operate as a cancellation of the bond, notwithstanding the actual terms of the obligation of the bond.

1933 A.C. p. 514.

In all other cases the bond shall not be cancelled, unless: (1.) Within the period named in said bond, there be produced to the proper collector or officer of customs and excise the duly authenticated certificate of some principal officer of customs at the place to which the goods were exported, stating that the goods were actually landed and left at some place (naming it) out of Canada, as provided by the said bond; or (2.) Within the period of three months from the date of the exportation of the goods, evidence satisfactory to the commissioner of customs and excise shall be furnished to him that the goods so undertaken to be exported shall not have been re-landed in Canada, or if re-landed in Canada, that the proper entry has been made at customs and the proper duties paid thereon.

Where a shortage occurs in goods so forwarded, ex-warehouse for exportation, and same are not accounted for

by exportation from out of Canada to the department of customs and excise on export entry No. B-13, it is the duty of the collector of customs and excise at the frontier port where such goods were short received for exportation, to notify the collector of customs and excise of the port from which such goods were shipped for exportation, when the collector of customs and excise for said port shall require the consignor to pass entry, and pay the lawful duty payable upon the goods short delivered at the frontier port, in accordance with the regulations contained in departmental circular No. G.797."

No form of bond was prescribed by the Revenue Act or by the regulations; but a printed departmental form of bond was in fact used.

The relevant facts may now be stated. It will, their Lordships think, be sufficient if the facts relating to one action only are stated in detail, attention being drawn to any material difference which exists in regard to the others. For this purpose they select the first action (No. 9370).

On February 4 and 5, 1924, the appellants received orders from a customer, Consolidated Exporters Corporation, Ld., to ship altogether 4250 cases of spirits to John Douglas & Co., Corinto, Nicaragua. The cases were taken out of the excise bonding warehouse at Belleville and sent by rail to Vancouver, where they were placed on board the steamship *Malahat*, the master of that vessel signing four "Entry for export ex-warehouse" forms, which covered respectively 1000, 1250, 1000 and 1000 cases, as having received the goods "on board the steamship *Malahat* for exportation to John Douglas & Co., Corinto, Nicaragua." 2250 cases were taken out of the warehouse on February 8, 1924, and on that date two bonds were executed by the appellants and Hume, one in a sum equal to double the amount of duty in respect of 1250 cases, the other in a sum equal to double the amount of duty in respect of 1000 cases. On February 12, 1924, two further bonds were executed by the same parties in sums amounting altogether to double the amount of duty in respect of the balance of 2000 cases which were taken out of the warehouse on that day. The *Malahat* sailed from Vancouver on February 23, 1924. As appears from her "Report outwards," two of the 2000

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cases never reached the *Malahat;* they apparently disappeared in transit from Belleville, and on them duty has been paid.

On April 7, 1924, the appellants notified the collector of customs and excise at Belleville (Mr. Geen) that the owners of the *Malahat* had received instructions from the shippers (Consolidated Exporters Corporation Ld.) and the consignees (John Douglas & Co.) to discharge the cargo at Buenaventura, Colombia, in place of Corinto, Nicaragua, and requested him to make a note of the fact on his records.

The appellants subsequently received from the shippers four "Entry for export ex-warehouse forms," covering respectively the 1250, 1000, 998 and 1000 cases upon each of which appeared the following certificate: "I, G. W. Yates, do hereby certify that the same identical goods described and contained in the within export entry have been landed at the port of Buenaventura in Colombia and have been duly delivered over to the customs. Witness my hand and seal of office this 21 day of Marzo 1924. G. W. Yates."

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There appeared upon the document a stamp, or seal, purporting to be the stamp or seal of the British consular agency, Buenaventura, and there were pasted on the document what purported to be two tax stamps of the British consular agency, Buenaventura, with the date March 21/24. At the foot of the form is to be found the following printed note: "NOTE.—If the goods are exported to Great Britain or any British colony or possession, this certificate may be signed by any principal officer of customs or of colonial revenue at the place to which the goods are exported, or if such goods are exported to any place in any foreign country, it may be signed by any officer of customs therein, or any British or foreign consul or vice-consul resident there."

These four documents were forwarded by the appellants to Mr. Geen, in a letter dated April 24, 1924. Mr. Geen, acting upon those documents, cancelled the four bonds by making entries in the record book to show that they were cancelled. According to practice, the bonds were not delivered up, but remained on the file at the excise office where they had been placed when the goods were being shipped.

The *Malahat* returned to Vancouver in ballast on May 15, 1924, bringing with her a bill of health and foreign clearance, both dated April 5, 1924, the former purporting to be given by the British Consul at Buenaventura, and the latter purporting to grant permission from the port authority at Buenaventura for the *Malahat* to sail that day for Vancouver direct in ballast.

In truth, the *Malahat* never went to Buenaventura. She sailed right down the coast to a point about twelve miles south of the boundary between the United States and Mexico, and discharged her cargo into sundry vessels at various points from twenty to fifty miles out at sea off the coasts of California and Lower California. Having disposed of her cargo, she received the bill of health and foreign clearance above mentioned, from a vessel on the high seas, and returned to Vancouver.

In the second action (No. 9371) the facts are substantially the same. The goods, however, were taken from an excise bonding warehouse at Vancouver, and were shipped on board the steamship *Prince Albert*, for delivery to W. O. Watson at Chiperinco, Guatemala. Subsequently, notice was given to the collector at Vancouver of a change from Chiperinco to Buenaventura. The appellants received a landing certificate signed by the British consular officer at Buenaventura, stating that the goods had been delivered to the Customs there. The *Prince Albert* never went to Chiperinco. On production of this certificate the collector at Vancouver cancelled the one bond which had been given, by writing the word "cancelled" on the bond. By admissions consented to by the parties it must be taken that the collector cancelled the bond upon the belief that the landing certificate was genuine and true. The appellant Smith was a party to this bond.

1933 A.C. p. 517.

In the third action (No. 10,314) the facts are substantially the same as in the first action except that the goods were, according to the documents, consigned in the *Malahat* to La Libertad, San Salvador. On receipt of the landing certificates Mr. Geen wrote and informed the appellants that "the bonds covering the above shipments have been cancelled." By admissions consented to by the parties it must be taken that Mr. Geen cancelled the bonds in

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accordance with his usual custom, that he believed the landing certificates to be genuine and true, and that he cancelled the bonds upon this belief.

When the true facts had been ascertained, the Attorney-General for Canada filed three informations in the Exchequer Court of Canada, claiming on behalf of His Majesty the full amount of the sums named in the bonds. Of the three informations, one related to each of the three shipments in the *Malahat*, the *Prince Albert*, and the *Malahat*, respectively.

At this point it is necessary to state the form of the condition of the bonds. After proclaiming that the persons in question are bound to the King in the stated sum, the document recites that the appellants have given notice of intention to export to the specified port in the specified ship of which the specified individual is master, the specified goods (designated by the marks, numbers, and contents of packages), and then proceeds as follows (the sample given being the bond covering the 1250 cases taken out of the bonding warehouse on February 8, 1924): "Now the condition of the above written obligation is such that if the said goods and every part thereof shall be duly shipped, and shall be exported and entered for consumption or for warehouse at Corinto, Nicaragua, aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the warehousing regulations in that behalf, be adduced within 60 days from the date hereof, to the satisfaction of the said collector of inland revenue for the division of . . . . or if the above bounden Consolidated Distilleries, Ld., shall account for the said goods to the satisfaction of the said collector of inland revenue for the said inland revenue division of Vancouver, B.C., then this obligation to be void, otherwise to be and remain in full force and virtue." It is common ground that in this condition the word "Belleville" must be substituted for the words "Vancouver, B.C."

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The information in each case contained specific allegations showing that the condition of the bond had not been performed.

The appellants in each case pleaded (amongst other pleas) that they were not indebted; that the bonds were void; that the goods were actually exported from Canada,

had left Canada, and had never been relanded in Canada; and that the Court of Exchequer had no jurisdiction to decide the matter at issue.

In reply, it was roundly alleged that the appellants had devised a fraudulent scheme to obtain the removal of liquors from customs bond without payment, by the production of landing certificates, forged or otherwise fraudulently procured, and that any cancellation of the bonds based on the production of such false certificates was ineffective.

It must here be stated that this charge of fraud against the appellants was never established, and that the case fell and falls to be decided upon the footing that the appellants had no reason to believe that the landing certificates which they sent to the collector were other than honest documents being what they purported to be, and that the facts therein certified were correctly and truthfully certified. It should further be stated that it was not established in the actions whether the landing certificates were in fact forgeries or (if genuine) by what means they had been procured.

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In the Exchequer Court it was ordered and adjudged that the plaintiff do recover from the defendants the full sums named in the bonds without interest with his taxed costs of action. The learned President (Maclean J.) held that the conditions of the bonds had not been performed, that the cancellations did not discharge the defendants, because the cancellations were procured by fraud. He also held that the Exchequer Court had jurisdiction to deal with the matter; but that no interest was recoverable.

Upon appeal to the Supreme Court by the defendants and cross-appeal by the plaintiff (as to interest), the appeal and cross-appeal were both dismissed with costs. The question of interest was not further in dispute before the Board. Anglin C.J. upheld the jurisdiction of the Exchequer Court, and thought that a breach of the condition of each bond had been clearly established, and that the full amount named in each bond must be paid. Duff J. (with whom Rinfret and Lamont JJ. concurred) agreed that the Court had jurisdiction. He thought that the cancellations of the bonds were inoperative, the documents upon which the cancellations proceeded being concocted documents, and that the conditions under which the regulations alone permitted

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cancellation never came into effect. He further held that what he termed "the alternative condition" of the bond had not been performed, because there was no ground for finding that the appellants did account for the goods to the satisfaction of the collector. He thought that the whole amount named in the bond was recoverable.

Upon appeal to His Majesty in Council various points were argued and discussed, but in the view which their Lordships take of the rights of the parties it is only necessary to deal with two matters—namely: (1.) whether the Court of Exchequer had jurisdiction to try the actions, and (2.) whether in the circumstances which exist in these cases the condition of the bonds was fulfilled so that the bonds, without the necessity of any cancellation (in the sense of a release of an otherwise existing obligation), became void and ceased to be binding according to their tenor. In particular their Lordships express no opinion upon the correctness of the view which has prevailed in the Courts below that the Crown (if entitled to succeed in the actions) was entitled to recover the full amount of the penalties secured by the bonds.

1933 A.C. p. 520.

The question of jurisdiction depends upon a consideration of the British North America Act, 1867, and the Exchequer Court Act (R.S. Can., 1927, c. 34). The matters in regard to which the Provincial legislatures have exclusive power to make laws include, under the British North America Act, s. 92, head 13—"Property and civil rights in the province"—and s. 92, head 14—"The administration of justice in the province including the constitution, maintenance and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." Sect. 101, however, provides that: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the . . . . establishment of any additional courts for the better administration of the laws of Canada."

The Exchequer Court of Canada was constituted in the year 1875 in exercise of this power. It was conceded by the appellants (and rightly, as their Lordships think) in the argument before the Board, that the Parliament of Canada could, in exercising the power conferred by s. 101, properly confer upon the Exchequer Court jurisdiction to hear and determine actions to enforce the liability on bonds executed

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in favour of the Crown in pursuance of a revenue law enacted by the Parliament of Canada. The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the necessary jurisdiction. The relevant section is s. 30, which is in the following terms: "30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information in rem, and as well in qui tam suits for penalties or forfeiture as where the suit is on behalf of the Crown alone; (*b*) in all cases in which it is sought at the instance of the Attorney-General of Canada to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands; (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. R.S., c. 140, s. 31." By virtue of s. 2 (*a*) the Crown means the Crown in right or interest of the Dominion of Canada.

The learned President held that the Exchequer Court had jurisdiction, inasmuch as the bonds were required to be given by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. The subject-matter of the actions directly arose from legislation of Parliament in respect of excise.

The Chief Justice thought that the cases fell clearly within s. 30 (*d*), and probably also within s. 30 (*a*). Duff J., while suggesting a possible doubt as to the application of sub-s. (*a*), held that the cases were plainly within sub-s. (*d*).

Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances. In regard to the present case their Lordships appreciate that a difficulty may exist in regard to sub-s. (*a*). While these actions are no doubt "cases relating to the revenue," it might perhaps be said that no law of Canada is sought to be

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enforced in them. Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (*d*). It was suggested that if read literally, and without any limitation, that sub-section would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be ultra vires the Parliament of Canada as one not covered by the power conferred by s. 101 of the British North America Act. Their Lordships, however, do not think that sub-s. (*d*), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding sub-sections the actions and suits in sub-s. (*d*) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be ultra vires, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions.

There remains for consideration the second question, which is indicated above, and which turns mainly upon the true construction of the condition of the bonds. This construction appears reasonably plain. The obligation is to be void upon the happening of one of two alternative events. The first of these is a compound event consisting of (1.) the goods being shipped, exported and entered for consumption or for warehouse at the specified port; and (2.) proof of such exportation and entry in accordance with the regulations being adduced within a fixed time to the satisfaction of the collector. The second alternative event is the appellants accounting for the goods to the satisfaction of the collector. It was contended on behalf of the Crown that upon the true construction, the first limb of the compound event indicated above applied to the whole condition. This does not appear to their Lordships a construction consonant either with grammar or with probability. It would give but small scope for the operation of the last sentence of the condition; for if the actual fact of exportation and entry must exist in all cases before the obligation is avoided, it follows that the existence of that fact must be established by proof, in which case there

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could be (apart from the question of time limit) no room for any other or further accounting for the goods. On the other hand, a reasonable and probable construction is that the last sentence is introduced as a second alternative event (a safety-valve) which though it would include the first alternative will also meet the cases, which must from time to time occur, where compliance with the opening sentence of the condition has for some reason become impossible. Of such cases, the first shipment here in the *Malahat* (which was not plying on a published route or schedule) would form an excellent example if the shippers had been acting honestly. Owing to a change after the execution of the bond of the port specified in the condition, the obligation could never have been avoided according to its tenor if the Crown's construction were the correct one. The obligation would necessarily continue unless and until cancellation (in the sense of release) was obtained by furnishing to the satisfaction of the commissioner of customs and excise the evidence required by the later part of regulation 17 within the period of three months from the date of the bond.

It was further contended that the condition should be construed in the light of the regulations which are referred to therein, and that the light so shed, in particular by regulation 16, revealed that the bonds were to be solely conditioned for the due delivery of the goods at the place designated in the entry for export. Even if regulation 16 may properly be read for the purpose of construing the condition (and their Lordships are not satisfied that it may), it does not bear the construction placed upon it by the Crown. The emphasis is upon the necessity of a limit of time within which delivery has to take place, and there is no prohibition in the regulation of a condition with alternatives.

Upon the true construction of the condition their Lordships feel no doubt that the obligation under the bonds was avoided if and when the appellants accounted for the goods to the satisfaction of the collectors.

The final question then remains, did they in fact so account for the goods? 1933 A.C. p. 524.

The appellants believed and the collectors believed that the goods had been landed at Buenaventura and La Libertad.

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They had no reason to doubt the genuineness or the truthfulness of the landing certificates. Mr. Geen, in his evidence in the first action, says that he acted upon them and cancelled the bonds, believing that the goods had gone to Buenaventura. The fact of what has been called the cancellations of the bonds, is the best possible evidence that in each case the appellants did in fact account for the goods to the satisfaction of the collector. Once that state of affairs was brought into existence, then according to the terms of the bond, the obligation thereunder became void. Their Lordships can see no escape from that conclusion.

It was argued that this result could not ensue because the crucial fact had been brought about by the production of fraudulent documents. Whatever might be the position if the appellants had been parties to the fraud (as to which their Lordships say nothing), the facts here are otherwise. The appellants acted in good faith.

It was further contended that the satisfaction of the collector having been brought about by innocent misrepresentation, the obligation under the bonds should in some way be re-created and restored. Such an argument might be sustainable if the appellants had been forced to rely upon cancellation in the sense of a release, or an agreement to release. It might then be said that that was a transaction which had been procured by innocent misrepresentation, and that it should be set aside with the result of restoring that which had been released or contracted to be released. Their Lordships express no view as to this. There is, however, no room for such a contention here. The appellants are not relying upon any outside transaction to free them from liability. They are relying only upon the terms of the document which created the liability and which provided that the liability should end with the happening of a certain event. Their Lordships are not aware of any doctrine equitable or otherwise which entitles the Crown to say that the event is to be deemed not to have happened, or that liability under the bond is to survive notwithstanding that the event, which according to the bond avoids the obligation, has in fact happened.

1933 A.C. p. 525.

The result is that in the opinion of their Lordships the appellants are under no liability in respect of the bonds. When the true position is realized it would seem strange if the Crown could in these cases recover these double

duties. The actual destination of the liquor may well be suspected; the least likely scene of its actual consumption is Canada. So long as it left Canada and was not relanded there, no duty would be payable under the Revenue Act. The Revenue Act is not concerned with prohibition legislation, but with collecting excise duty where under its provisions it is properly payable. It would indeed be matter for comment and wonder if the Crown were entitled to double duties in a case where no duty was payable under the Act at all, and where the bonds in suit were only required by the Act to be given as security for the payment of duty.

This appeal should be allowed, the orders of the Supreme Court and the Exchequer Court should be set aside (but as to the orders of the Supreme Court not so far as they dealt with the Crown's cross-appeal and dealt with the costs thereof), and an order should be made in each of the three actions dismissing the action with costs. The respondent should pay to the appellants their costs of their appeals in the Supreme Court and here. Their Lordships will humbly advice His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

PROVINCIAL TREASURER OF ALBERTA AND ANOTHER..... } APPELLANTS;

AND

C. E. KERR AND ANOTHER.....RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada (Alberta)—Legislative power of Province—Duties payable on death—Personal property outside Province—Indirect taxation—Succession Duties Act (R.S. Alta., 1922, c. 28, as amended)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 2.

Under the British North America Act, 1867, s. 92, head 2, a Province is not entitled to impose taxation payable on the death of a person therein domiciled in respect of his personal property locally situate outside the Province, but is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the Provincial law of personal property so situate. Personal property outside the Province cannot be treated for the above purpose as within it by an application of the principle mobilia sequuntur personam: that principle relates to the law governing the devolution of personal property, not to its local situation.

If a Provincial statute imposing succession duties makes the executor personally liable for the duties the taxation is indirect and therefore invalid; that rule is not confined to the case of property within the Province.

Upon the true construction of the Succession Duties Act of Alberta the executor is made personally liable for the duties, and as to personal property outside the Province the duties are imposed upon the property itself, not upon its transmission. Consequently, as to property within the Province the taxation is invalid, because it is not direct, and as to personal property outside the Province it is invalid, both because it is not direct and because it is not within the Province.

Review of the decisions of the Judicial Committee upon both the above matters.

In re Cust (1915) 8 Alb. L.R. 308 disapproved.

Appeal from the judgment of the Supreme Court of Alberta dismissed and cross-appeal allowed.

CONSOLIDATED CROSS-APPEALS (No. 1 of 1933) from a judgment of the Appellate Division of the Supreme Court of Alberta (July 22, 1932) upon a case stated by agreement of the parties and referred to the Appellate Division pursuant to the Alberta Rules of Court.

1933 A.C. p. 711.

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* *Present:*—LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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The cross-appeals related to the validity of duties assessed under s. 7 of the Succession Duties Act of Alberta—R.S. Alta., 1922, c. 28, as amended in 1923 and 1927 (1)—in respect of the property of Isaac Kendall Kerr, who died on December 3, 1929, and was domiciled and resident in Alberta. The beneficiaries and the executors of his will were resident in the Province. The executors, together with a surety, entered into a joint and several bond pursuant to ss. 12 and 13 of the Act for the payment of any duty to which the property of the deceased coming to the hands of the executors should be found liable.

The facts as appearing in the case stated, the questions submitted to the Court, and the terms of s. 7 of the Act are set out in the judgment of the Judicial Committee.

Sects. 9 and 16 of the Act provided:—

"9. Every person resident in the Province to whom passes on the death of any person domiciled in the Province any personal property situate outside the Province, shall pay to the Provincial Treasurer for the use of the Province a tax calculated upon the value of the property in accordance with the rates and subject to the considerations set forth in sections 7 and 8 of this Act."

"16. The duties imposed by this Act shall be payable out of the shares of each person or beneficiary entitled to share in the property of the deceased, according to the rate applicable as aforesaid to such person or beneficiary."

By the British North America Act, 1867, s. 92 (head 2), the Province had legislative power to impose "direct taxation within the province, in order to the raising of a revenue for provincial purposes."

In answer to the first question submitted the Appellate Division held by a majority (Clarke, Lumley, and MacGillivray JJ.A.; Ford and Mitchell JJ.A. dissenting) that the duties levied in respect of personal property of the deceased locally situate outside the Province were invalid. In answer to the second question submitted, the learned judges held unanimously that the duties levied in respect of real and personal property locally situate within the Province

1933 A.C. p. 712.

(1) The Act was further amended and consolidated by c. 16 of the Statutes for 1932.

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were direct taxation and consequently valid; in so holding the earlier decision of the Court *In re Cust* (1) was followed.

The Province appealed from the judgment in answer to the first question, and the executors appealed from the judgment in answer to the second question.

1933. May 23, 25, 26, 29, 30. *H. J. Wilson* for the Province. The deceased being domiciled in the Province, the duties were validly imposed in respect of his personal property situate outside the Province. The duties were taxation "within the Province"—First, because the Act, having regard especially to ss. 7, 9 and 16, did not impose the duties on the property, but on its transmission within the Province. The taxation was therefore valid under the decision of the Board in *Alleyn* v. *Barthe*. (2) The amendments of the Act made in 1927, in consequence of decisions of the Judicial Committee, altered in that respect the character of the duties so imposed. Secondly, and alternatively, because the duty was of the nature of a succession or legacy duty, as it was imposed by ss. 9 and 16 upon the beneficiaries and varied with their relationship to the deceased. The taxation being of that nature the principle mobilia sequuntur personam applied: *Winans* v. *Att.-Gen. (No. 2)*. (3) It is clear from *Thomson* v. *Advocate-General* (4) and other cases that that principle was well established in England before 1867, and it is to be presumed that it was intended to apply under the British North America Act. The Supreme Court of Canada, in *Smith* v. *Provincial Treasurer of Nova Scotia* (5) and *Barthe* v. *Alleyn-Sharples* (6), held that under the maxim personal property was to be regarded as within the Province where the deceased was domiciled, although it was physically situate outside the Province, and the judgments of the Board on appeal in these cases do not in terms dissent from that view: see also *Att.-Gen. for Ontario* v. *Baby*. (7) The Board applied the principle in *Lambe* v. *Manuel* (8); in *Cotton* v. *Rex* (9) it was held not to be applicable, but on the ground that the statute in terms taxed only property within the Province. Sect. 7 of the statute now in question

1933 A.C. p. 713.

(1) 8 Alb. L.R. 308.
(2) [1922] 1 A.C. 215.
(3) [1910] A.C. 27, 31.
(4) (1845) 12 Cl. & F. 1.
(5) (1918) 58 Can. S.C.R. 570.
(6) (1920) 60 Can. S.C.R. 1.
(7) (1926) 59 Ont. L.R. 181; 60 Ont. L.R. 1.
(8) [1903] A.C. 68.
(9) [1914] A.C. 176, 186.

clearly shows an intention that the principle should apply; effect should be given to the intention of the legislature in that respect: *Blackwood* v. *The Queen.* (1) The decision in *Woodruff* v. *Att.-Gen. for Ontario* (2) is distinguishable, because the duty in that case was not upon the transmission but upon the property. Thirdly, because the liability under the bond was only in respect of property "coming to the hands" of the executors, and therefore was confined to property within the Province.

The duties were also "direct taxation." The Act did not make the executors personally liable for the duties. Under ss. 9 and 16 the beneficiaries were liable on personal property outside the Province; the lien under s. 24 was confined to property within the Province. The executors could not be sued for the duties and were not obliged to give the bond. The present case is therefore distinguishable from *Cotton* v. *Rex* (3) and *Burland* v. *The King.* (4) Moreover, both those cases related to property outside the Province. In *Rex* v. *Lovitt* (5), where the property was held to be within the taxing Province, the tax was not held to be indirect although the executor was made personally liable. In *City of Halifax* v. *Fairbanks' Estate* (6) the Board said that *Cotton's* case "turned on its own facts." It is submitted that *In re Cust* (7) and the present case, rightly held that *Cotton's* case did not apply in the case of property outside the Province. [Reference was made also to *In re Muir Estate* (8), also to four decisions of the Supreme Court of British Columbia as to succession duty in that Province.]

1933 A.C. p. 714.

W. H. McLaws for the executors. At confederation it was necessary to limit the powers of the Provinces to impose taxation so as to prevent a Province encroaching upon the power of another Province. The limitations contained in s. 92, head 2, of the British North America Act prevent decisions with regard to statutes enacted by legislatures with unlimited powers from being applicable. Although the words "within the Province" in head 2 do not confine the power of taxing property in the Province they mean that if taxation is in respect of property the property must

(1) (1882) 8 App. Cas. 82, 96.
(2) [1908] A.C. 508.
(3) [1914] A.C. 176.
(4) [1922] 1 A.C. 215.
(5) [1912] A.C. 212.
(6) [1928] A.C. 117, 126.
(7) 8 Alb. L.R. 308.
(8) (1915) 51 Can. S.C.R. 428.

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be locally situated in the Province. The maxim "mobilia sequuntur personam" has been misapplied in some decisions in Canada: it relates to the law governing the devolution of personal property, and does not affect the situs of the property. In *Lambe* v. *Manuel* (1), where the Board gave effect to the principle, the property was locally situate in the taxing Province, but the deceased was domiciled outside it, and the tax was in respect of transmissions in the Province. The present case is distinguishable from *Alleyn* v. *Barthe* (2), because the effect of s. 7 of the Act is to impose the taxation upon personal property outside the Province, not upon its transmission; ss. 9 and 16 merely give power for collecting the duties from the beneficiaries, but do not alter the character of the tax. The object of the Act was to tax property passing upon the death. There is no conflict between *Alleyn* v. *Barthe* (2) and *Woodruff* v. *Att.-Gen. for Ontario* (3), and upon the construction of the Act the latter decision applies to this case. *Rex* v. *Lovitt* (4), like the present case, is an example of a duty described as a succession duty but being found to be a tax imposed upon the property itself.

1933 A.C. p. 715.

The duties were also invalid both as to property within and personal property outside the Province, because they were indirect taxation having regard to the decisions of the Board in *Cotton's* case (5) and *Burland's* case (2). By ss. 11 to 13 of the Act the executors in order to obtain probate had to pay the duties or give a bond upon which they were personally liable. The fact that under s. 9 the beneficiaries could be required to pay does not affect the matter. There was no provision in the Act, similar to that in the Quebec statute considered in *Alleyn* v. *Barthe* (6), expressly providing that the executors were not to be personally liable. With the exception of Alberta and British Columbia the Provinces have brought their statutes imposing succession duties into line with the Quebec legislation. In applying the principle in *Cotton's* case no valid distinction can be drawn between property within and property outside a Province. *In re Cust* (7) was overruled in effect by *Burland's* case. (2) In *Rex* v. *Lovitt* (4) the

(1) [1903] A.C. 68.
(2) [1922] 1 A.C. 215.
(3) [1908] A.C. 508.
(4) [1912] A.C. 212.
(5) [1914] A.C. 176.
(6) [1922] 1 A.C. 215, 228.
(7) 8 Alb. L.R. 308.

question of direct taxation was not dealt with; moreover the duty there in question was in the nature of a probate duty payable for local administration.

H. J. Wilson on the cross-appeal contended that on the true construction of the statute the executor was not made personally liable for the duties, and that the taxation was direct, reference being made to *Att.-Gen. for Quebec* v. *Reed* (1); *Rex* v. *Caledonian Insurance Co.* (2); *Toronto General Trusts Corporation* v. *The King* (3); *Erie Beach Co.* v. *Att.-Gen. for Ontario* (4); *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (5); *City of Halifax* v. *Fairbanks' Estate.* (6) He replied on the original appeal.

July 27. The judgment of their Lordships was delivered by

LORD THANKERTON. The late Isaac Kendall Kerr died on December 3, 1929, domiciled and resident in the Province of Alberta. He left a large estate, and the respondents in the original appeal, both of whom are resident in the city of Calgary, obtained letters probate as executrix and executor of his will. Thereafter duties amounting to $54,754.21 were assessed under the Alberta Succession Duties Act by the Provincial Treasurer in respect of the property of the deceased, and the respondents, along with a surety, entered into the bond afterwards referred to in order to secure payment of these duties.

1933 A.C. p. 716.

The respondents challenged the validity of the imposition of these duties by the Province and a special case was agreed to by the parties, which was referred, pursuant to the Alberta Rules of Court, to the Appellate Division of the Supreme Court of Alberta. In this case two questions were referred for determination, and the decision of the Appellate Division, given July 22, 1932, has led to the original appeal by the Provincial Treasurer and the Attorney-General for Alberta (hereinafter called "the Province"), and a cross-appeal by the executrix and executor (hereinafter called "the executors").

The property in respect of which the duties were imposed is described in the special case as follows:—

(1) (1884) 10 App. Cas. 141.
(2) [1924] S.C.R. 207.
(3) [1919] A.C. 679.
(4) [1930] A.C. 161.
(5) [1930] A.C. 357, 363.
(6) [1928] A.C. 117.

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"(2.) The property owned by the said Isaac Kendall Kerr at the time of his death consisted of—*(a)* certain personal property of the aggregate value of $265,703.58 composed of shares and other securities of various companies which had no head office in the Province of Alberta, and none of which had any registration or transfer office within the said Province, together with other personal property locally situate outside of the said Province. The share certificates and other documents evidencing such shares and other securities were found in the City of Calgary, in the Province of Alberta. *(b)* Certain real property and personal property having an aggregate value of $274,697.03. The real property is situate within the Province of Alberta and the personal property consists of shares and other securities in companies with head office and transfer office situate within the Province of Alberta, and other personal property locally situate within the said Province. (3.) Within two years prior to his death the said Isaac Kendall Kerr transferred to Clara E. Kerr, one of the plaintiffs, certain real estate situate within the Province of Alberta, together with certain personal estate."

1933 A.C. p. 717.

No question is raised as to the duties in respect of the property in para. 3, and the following questions were submitted for the opinion of the Court: "(1.) Whether or not the succession duties levied in respect of the property mentioned in sub-s. *(a)* in para. 2 of the special case are valid and payable to the defendants or either of them. (2.) Whether or not the succession duties levied in respect of the property mentioned in sub-s. *(b)* in para. 2 of the special case are valid and payable to the defendants or either of them."

The determination of the validity of the imposition of the duties depends on the application of the limits placed upon the taxing powers of a Province by s. 92 of the British North America Act, 1867—namely, "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes," to the provisions of the Alberta Succession Duties Act. As regards the first question, which relates to personal property locally situate outside the Province, the issue is twofold—namely, whether the taxation is direct and whether it is within the Province. On the

second question, which covers real and personal property situate within the Province, the issue is whether the taxation is direct.

Dealing first with the question of taxation "within the Province," the general law as to the power of taxation of a sovereign state has been thus stated: *Blackwood* v. *The Queen* (1): "There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each state levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property."

There can be no doubt that the Alberta Succession Duties Act purports to impose taxation on the basis (inter alia) of personal property situate outside the Province, and therefore, if it possessed unlimited sovereign power, it would be entitled to impose such taxation on its subjects. Accordingly, the present question only arises because of the limitations placed on the legislative powers of the Province by s. 92 of the British North America Act, 1867, and, for this reason, the cases on legacy and succession duties in England are of little assistance for the present purpose. Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons—in any event, the duties here in question are not of that nature. In considering the limits placed on Provincial taxation, the Courts have invariably had regard to the basis or subject-matter in respect of which the taxation is imposed, and their Lordships agree with the statement of Anglin C.J. in *Rex* v. *Cotton* (2), where he said: "in order that a Provincial tax should be valid under the British North America Act, in my opinion the subject of taxation must be within the province."

1933 A.C. p. 718.

(1) 8 App. Cas. 82, 96.

(2) (1912) 45 Can. S.C.R. 469, 536.

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The Province maintained in the first place, that under the Alberta Succession Duties Act the subject-matter of taxation was the transmission of the property and not the property itself, and fell within the principle of the decision of this Board in *Alleyn* v. *Barthe*. (1)

In their Lordships' opinion, the principle to be derived from the decisions of this Board is that the Province, on the death of a person domiciled within the Province, is not entitled to impose taxation in respect of personal property locally situate outside the Province, but that it is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the Provincial law of personal property locally situate outside the Province.

1933 A.C. p. 719.

In *Lambe* v. *Manuel* (2) a claim was made by the Province of Quebec for succession duties on movable property locally situate in that Province, which formed part of the succession of a testator domiciled in Ontario. The claim was rejected on the view that, on its true construction, the Quebec Succession Duty Act only applied, in the case of movables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec. Sect. 1191B of the Quebec Act of 1892, on which the issue turned, provided as follows: "All transmissions, owing to death, of the property in, usufruct, or enjoyment of, moveable and immoveable property in the province shall be liable to the following taxes. . . . ." Thus the taxes were held to be imposed in respect of transmissions.

The Quebec Act of 1892 and the later Act of 1906, which re-enacted the words above quoted with alterations immaterial to this point, were considered in the case of *Cotton* v. *Rex* (3), and were construed as imposing the duties in respect of the transmission of the property. It was held, on construction, that neither of these Acts imposed any duty upon the transmission of movable property outside the Province, and also that the taxation was not direct, in respect that it was imposed on "someone who was not intended himself to bear the burden but to be recouped by someone else."

(1) [1922] 1 A.C. 215. (2) [1903] A.C. 68.
(3) [1914] A.C. 176.

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In *Woodruff* v. *Att.-Gen. for Ontario* (1), the deceased having died domiciled in the Province of Ontario, that Province claimed succession duty in respect of movable property locally situate in the United States. It was held to be an attempt to levy a tax on property locally situate outside the Province, which was beyond their competence. The Ontario Act of 1897, s. 4, sub-s. 1, provided "the following property shall be subject to a succession duty," which clearly was not a tax in respect of the transmission of a succession.

The case of *Rex* v. *Lovitt* (2) provides an interesting contrast to *Lambe's* case. (3) The testator, who died domiciled in Nova Scotia, was possessed of certain personal property locally situate in the Province of New Brunswick, in respect of which the latter Province claimed succession duty. It was held that, although called a succession duty, the tax in question was laid on the corpus of the property, and its payment was made a term of the grant of ancillary probate, and the claim to duty was upheld. The New Brunswick Succession Duty Act, 1896, s. 5, sub-s. 1, enacted: "All property, whether situate in this province or elsewhere, ... passing either by will or intestacy . . . . shall be subject to a succession duty."

1933 A.C. p. 720.

In *Alleyn* v. *Barthe* (4), though an argument to the contrary was submitted, the judgment clearly proceeds on the footing that the taxation was imposed in respect of the transmission, and it may be noted that by the Quebec Succession Duty Act, 1909, as revised in 1914, s. 1387B: "All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death," were made liable to the duties; this provision is substantially the same as that under construction in *Lambe's* case (3). The main question in *Alleyn's* case (4) was whether the taxation was direct, but, in delivering the judgment of this Board, Lord Phillimore, after referring to the statutory provisions, states: "The conditions therein stated upon which taxation attaches to property outside the Province are two: (1.) that the transmission must be within the Province; and (2.) that it must be due to the

(1) [1908] A.C. 508.
(2) [1912] A.C. 212.
(3) [1903] A.C. 68.
(4) [1922] 1 A.C. 215.

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death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is, as the universal legatee in this case was, either domiciled or ordinarily resident within the Province; for, in the connection in which the words are found no other meaning can be attached to the words 'within the Province' which modify and limit the word 'transmission.' So regarded, the taxation is clearly within the powers of the Province."

The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary. In the present case, s. 7, sub-s. 1, is the charging provision, and as amended provided as follows:—

1933 A.C. p. 721.

"7.—(1.) Save as otherwise provided, all property of the owner thereof situate within the Province, and in the case of an owner domiciled in the Province, all the personal property of the owner situate outside the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following, or by some one or more of the following considerations, as the case may be:—

(a) the net value of the property of the deceased;

(b) the place of residence of beneficiary;

(c) the degree of kinship or absence of kinship of the beneficiary to the deceased:"

In their Lordships' opinion, the terms of this section, which is very similar to that considered in *Lovitt's* case, clearly show that the subject-matter of the taxation is the property and not the transmission of property; it is in marked contrast to the terms of the Quebec section considered in the cases of *Lambe* and *Alleyn*. It may be added that s. 9 of the Alberta Act, on which the Province sought to rely, does not modify this view, but merely provides a particular liability for payment of the tax.

The Province next contended that, although locally situate outside the Province, the personal property of a person, who dies domiciled within the Province, is to be treated as "within the Province" for the purposes of s. 92 of the

British North America Act, by reason of the application of the rule embodied in the maxim "mobilia sequuntur personam." This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A dies domiciled in the United States of America, leaving movable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A, will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of mobilia sequuntur personam in exercising its jurisdiction over the movable property in England, the locus of the latter remaining unchanged; in no sense could the property be described as "within America."

1933 A.C. p. 722.

The Province further maintained that, as the bond given by the executors limited their liability to the duties in respect of property "coming into their hands," and the property here in question had admittedly come into their hands, the taxation was in respect of property within the Province; but, in their Lordships' opinion, the bond merely defines the extent of the security taken from the executors, and its terms cannot affect the validity or invalidity of the duties imposed under s. 7 of the Act. While that is sufficient to dispose of the contention, it may well be doubted whether "coming into their hands" means anything more than that the executors have completed their title to the property in question, the local situation of the property remaining unchanged.

Accordingly, their Lordships are of opinion that the duties under s. 7, so far as imposed on personal property locally situate outside the Province, did not come within the limits placed on Provincial taxation by s. 92 of the British North America Act.

There remains the question of "direct taxation." The principle to be applied in such cases is now well settled. Is the duty imposed on the very person whom the legislature intended or desired should pay it, without any expectation or intention that he should indemnify himself at the expense of some other person? Under the Alberta Succession Duties Act the duties in question were imposed on the executors on their application for probate, and letters

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probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships' opinion the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* (1) and *Alleyn* (2), already referred to—namely, whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

In *Cotton's* case, the provisions of the Quebec Succession Act, 1906, were construed by this Board as entitling the collector of inland revenue to collect the whole of the duties on the estate from the person making the declaration and as providing, in the ordinary case, for payment of the duties by some one who was not intended himself to bear the burden but to be recouped by some one else, and the taxation was held to be indirect. Three erroneous views as to this decision have been subsequently propounded, two of which were corrected in *Burland* v. *The King* (2), which was decided by this Board at the same time as *Alleyn's* case. The first suggestion was that the illustration of the declaration by the notary, before whom the will was executed, was based on inaccurate information, and that the value of the decision was thereby impaired; but it was pointed out in *Burland's* case that the case of the executor, or administrator, or legatee by a particular title might equally well have been taken, and that the error did not affect the force of the decision. The second suggestion in *Burland's* case was that the point was not necessary for the decision in *Cotton's* case, which had already been determined by other independent consideration; but

(1) [1914] A.C. 176. (2) [1922] 1 A.C. 215.

it was held that the decision in *Cotton's* case on the invalidity of the statute was just as complete and fundamental as the decision in the earlier part of the judgment on the construction of the statute. The third suggestion, which has been adopted in certain decisions in Canada, including the present case, is that the decision on direct taxation in *Cotton's* case was confined to taxation in respect of movable property not within the Province.

In their Lordships' opinion, that view is not justified either in fact or in principle. Two passages from the judgment may be cited (1): (1.) "This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the provincial legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, 'in the province,' have been deleted from that clause," and (2.) "For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of 'property' contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province."

In principle also the local situation of the property comprised in the estate of the deceased appears to be irrelevant to the issue whether the executor is personally liable for payment of the duties, in the absence of any distinction in this respect drawn by the Act itself as regards duties in respect of different classes of property. In the Quebec Act, which was a tax on transmission, no such distinction was drawn, nor is any such distinction to be found in the present case.

(1) [1914] A.C. 176, 189, 193.

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1933 A.C. p. 725.

In *Burland* v. *The King* (1) the testator had died in 1907, and the Quebec Act was again in question. It was held that certain amendments to the Act, which had followed immediately after the decision in *Cotton's* case, were insufficient to avoid the applicability of that decision, and the taxation was held to be indirect. But in *Alleyn's* case, which was decided at the same time as *Burland's* case, the testator died in 1913, by which time further important amendments had been enacted, which led to a contrary conclusion. In their Lordships' opinion, it is clear that the reason for this conclusion was the new provision in art. 1387g of the Quebec Act, which was in the following terms: "No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails to do so may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

Reliance was placed in the Court below on the case *In re Cust* (2), but it will be clear from the views their Lordships have expressed as to the principle laid down by the cases of *Cotton* and *Alleyn*, that the decision of the Court which decided *Cust's* case on appeal was erroneous, and must be taken as overruled. *Rex* v. *Lovitt* (3), referred to in that decision, was the case of a local probate duty charged by the Province, where the property was

1933 A.C. p. 726.

(1) [1922] 1 A.C. 215. (2) 8 Alb. L.R. 308
(3) [1912] A.C. 212.

locally situate, for the collection or local administration of the particular property, and was not a case of pure taxation, as in *Cotton's* case (1) and the present one. The question of direct or indirect taxation is not referred to in the judgment, and the only reference to it in the argument was in a contention that the tax was imposed on a transmission in another Province and was therefore not direct; but it was held that the tax was not on transmission but on the corpus of the property.

Their Lordships are therefore of opinion that the succession duties levied in respect of the property mentioned in both sub-ss. (*a*) and (*b*) in para. 2 of the special case are not valid. In the case of sub-s. (*a*) the taxation is neither direct nor within the Province, and in the case of sub-s. (*b*) the taxation is not direct.

Their Lordships will accordingly humbly advise His Majesty that the appeal for the Province should be dismissed, and that the cross-appeal for the executors should be allowed, and that the judgment of the Appellate Division of the Supreme Court of Alberta should be varied by substituting for the words "are valid and payable" at the end of the second declaration the words "are invalid and are not payable," and should otherwise be affirmed. By agreement of parties there will be no order for costs.

Solicitors for Province: *Blake & Redden.*

Solicitors for executors: *Lawrence Jones & Co.*

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(1) [1914] A.C. 176.

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[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR BRITISH COLUMBIA..... } Appellant;

AND

KINGCOME NAVIGATION COMPANY, LIMITED..... } Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada (British Columbia)—Legislative Power of Province—Taxation—Tax on Consumers of Commodity—Direct or indirect Taxation—Regulation of Trade and Commerce—Customs and Excise—Fuel Oil Tax Act (Brit.-Col., 1930, c. 71; 1932, c. 51)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 2; s. 92, head 2; s. 122.

The Fuel-oil Tax Act, 1930, of British Columbia, which imposes a tax upon every consumer of fuel-oil according to the quantity which he has consumed, is valid under s. 92, head 2, of the British North America Act, 1867; the tax is direct taxation, because it is demanded from the very persons who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity it does not fall within the category of customs and excise duties, which are within the legislative powers of the Dominions, both because they are by nature indirect taxes and having regard to s. 122 of the Act. The Act being within the legislative power given by s. 92, head 2, and not purporting to regulate trade and commerce, is not invalid as infringing the Dominion authority under s. 91, head 2, to legislate for that purpose.

Judgment of the Court of Appeal for British Columbia reversed.

1934 A.C. p. 46. Appeal (No. 32 of 1933) from a judgment of the Court of Appeal for British Columbia (March 7, 1933), affirming a judgment of the Supreme Court of that Province (February 7, 1933).

The appellant sued the respondents in the Supreme Court of British Columbia to recover taxes under the Fuel-oil Tax Act (Statutes of British Columbia, 1930, c. 71), as amended by the Fuel-oil Tax Amendment Act (Statutes of British Columbia, 1932, c. 51). The legislation imposes a tax upon every consumer of fuel-oil according to the quantity which he has consumed. The question arising in the proceedings was whether the legislation was intra vires the Provincial legislature under the British North America Act, 1867. A previous statute of the Province

* *Present:*—Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Russell of Killowen, and Sir George Lowndes.

imposing taxation in respect of fuel-oil, namely, the Fuel-oil Tax Act (R.S.B.C., 1924, c. 251), was declared by the Privy Council to be invalid: see *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (1)

The material provisions of the legislation now in question appear from the judgment of the Judicial Committee.

The trial judge (Morrison C.J.) held that the legislation was ultra vires as it imposed an excise tax and therefore was indirect taxation. An appeal was dismissed (McPhillips J.A. dissenting). The Chief Justice of the Court of Appeal (J. A. Macdonald C.J.) held that the tax was invalid, both because it was an excise tax and because it infringed the powers of the Dominion legislature to make laws for the regulation of trade and commerce. Martin J.A., while expressing doubt, thought that the appeal should be dismissed. M. A. Macdonald J.A. was of opinion that the Act was invalid, because it imposed an excise duty.

1933. July 3, 4, 6. *Pritt K.C.* and *R. Symes* for the appellant. The tax imposed by the Act was direct taxation within s. 92, head 2, of the British North America Act, 1867, because it was payable by the persons on whom it was intended to fall and was not susceptible of being passed on. [Reference was made to cases mentioned in the judgment.] The tax was clearly distinguishable as to its incidence from the tax held to be invalid in *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (1) The majority in the Supreme Court wrongly regarded the tax as an excise duty. Though the word "excise" has sometimes been loosely applied, its meaning since the middle of the last century has been confined to a tax imposed in respect of home-produced commodities before they reach the consumer: O.E.D., s.v. "excise"; Sweet's Legal Dictionary, s.v. "excise"; Mill's Principles of Political Economy (1869), p. 504; Bateman's Excise Laws (1843), p. 4. Where in the judgments of the Board in *City of Halifax* v. *Fairbanks' Estate* (2) and in *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (3) customs and excise duties are spoken of as being indirect taxes the reference is to duties which are imposed in respect

1934 A.C. p. 47.

(1) [1927] A.C. 934. (2) [1928] A.C. 117, 125.
(3) [1930] A.C. 357, 364.

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of commodities before they reach the consumer and which may be assumed to be passed on in the course of business. The nature of the customs and excise Acts referred to in s. 122 of the Act of 1867 shows that "excise" is there used in the above sense. Even if the tax now in question can properly be described as an excise duty it is valid, because being a direct tax it was authorized by s. 92, head 2. No conflict was intended between that head and s. 122.

E. C. Mayers K.C. and *Wilfrid Barton* for the respondents. The decisions lay down that a tax is indirect if there would be a tendency to pass it on; they do not suggest that there can be no passing on unless the commodity on which the tax is imposed is passed on. Fuel-oil was extensively used for the purpose of manufacturing and transport, and the tax would be passed on in the price of the article manufactured or transported. It is sufficient to show that there would be a tendency to pass on the tax in some cases: *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (1); the real nature of the tax was to be ascertained: *Rex* v. *Caledonian Collieries Ld.* (2)

1934 A.C. p. 48.

In *City of Halifax* v. *Fairbanks' Estate* (3) and in *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (4) the judgments of the Board laid down that duties of customs and excise were indirect taxes without inquiry into their ultimate incidence. In *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (1) the question had been expressly left open whether the tax was invalid under s. 122 of the Act as being an excise tax. The tax now in question was an excise tax. The meaning of the word "excise," at any rate as used in 1867, cannot be limited as proposed: Johnson's Dictionary, s.v. "excise"; Adam Smith's Wealth of Nations (1863 ed.), p. 396; Burn's Justices Manual (1869), vol. 2, "Excise"; Stephen's Commentaries (following Blackstone), 17th ed., p. 318. An examination of legislation before 1867 shows that duties described as excise were imposed in many cases upon the consumer. Sect. 122 recognized that under s. 91, head 2, or possibly head 3, the Dominion had exclusive power to impose customs and excise duties. If "excise" has the limited

(1) [1925] A.C. 561.
(2) [1928] A.C. 358.
(3) [1928] A.C. 117, 125.
(4) [1930] A.C. 357, 364.

meaning suggested the express power given to the Provinces by s. 92, head 9, to impose licensing duties was not necessary. The tax now in question was to be collected like an ordinary excise duty, and with similar powers of search and inquiry. The tax was also invalid, because it infringed upon the power of the Dominion legislature to regulate trade and commerce. The Dominion had exempted fuel-oil from customs duties; the present tax conflicted with that policy, and was for the protection of coal. [Reference was made to *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (1), *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada.* (2)]

Pritt K.C. in reply. The Provincial power of taxation is not limited by the Dominion's power to regulate trade and commerce save where the taxing legislation directly interferes with that power: *Burland* v. *The King* (3), *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (4), *Att.-Gen. of Manitoba* v. *Manitoba Licence Holders' Association* (5), *Board of Commerce Act, 1919.* (6)

Oct. 12. The judgment of their Lordships was delivered by 1934 A.C. p. 49.

LORD THANKERTON. This is an appeal from the judgment of the Court of Appeal for British Columbia dated March 7, 1933, which affirmed, with one dissentient, the judgment of the Chief Justice of the Supreme Court of British Columbia dated January 11, 1933, by which the appellant's action for recovery of tax from the respondent was dismissed.

The appellant seeks to recover the tax by virtue of the provisions of the Fuel-oil Tax Act, Statutes of British Columbia, 1930, c. 71, as amended by the Fuel-oil Tax Act Amendment Act, Statutes of British Columbia 1932, c. 51. The issue in the case is whether the legislation in question is ultra vires of the Provincial legislature in respect either *(a)* that the taxation imposed thereby is not "direct taxation" within the terms of s. 92, head 2, of the British North America Act, 1867, or *(b)* that it invades the exclusive right of the Dominion under s. 91, head 2, to legislate for the regulation of trade and commerce.

(1) [1924] A.C. 222, 225.
(2) [1931] A.C. 310, 326.
(3) [1922] 1 A.C. 215, 220.
(4) [1896] A.C. 348, 360.
(5) [1902] A.C. 73, 80.
(6) [1922] 1 A.C. 191. 198.

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The material provisions of the Act of 1930, as amended by the Act of 1932, are as follows:—

"2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

3. The tax imposed by this Act shall be paid and collected at such times and in such manner as the regulations may prescribe.

4. The amount of any tax imposed by this act may be recovered by action in any Court as for a debt due to the Crown in right of the Province, and the Court may make an order as to the costs of the action in favour of or against the Crown. (2.) In every action for the recovery of any tax imposed by this Act, the burden of proving the quantity of fuel-oil consumed by the defendant, and of proving that the tax has been paid in respect of the fuel-oil in question, shall be upon the defendant. (1932, c. 51, s. 2.)

1934 A.C p. 50.

5.—(1.) Upon the expiration of thirty days after the commencement of this Act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a licence issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him. (2.) The manner of application and the forms of application and of the licence shall be as prescribed in the regulations. A licence fee of one dollar shall be payable in respect of each licence. (3.) The Minister of Finance may, without holding any formal or other hearing, cancel any licence issued pursuant to this section if the licensee is convicted of any offence against this Act, and may during the period of twelve months next succeeding the cancellation of that licence refuse to issue any new licence to the person so convicted.

6.—(1.) Every collector, constable, and every person authorized in writing by the Minister of Finance to exercise the powers of inspection under this section may without warrant enter upon any premises on which he has cause to believe that any fuel-oil is kept or had in possession, and may inspect the premises and all fuel-oil found thereon, and may interrogate any person who is found on the premises or who owns, occupies or has charge of the premises. (2.) Every person interrogated under this section who

refuses or fails to answer any question put to him respecting the fuel-oil kept or had on the premises, or who refuses or fails to produce for inspection or to permit inspection of any book, record or document, or any barrel, tank, or receptacle in his possession or under his control which he is required to produce for inspection or of which he is required to permit inspection, shall be guilty of an offence against this Act.

7.—(1.) Every person who consumes any fuel-oil in the Province and every person who keeps for sale or sells fuel-oil in the Province shall keep such books and records and shall make and furnish such returns as are prescribed in the regulations. (2.) Every person who refuses or fails to keep any book or record or to make and furnish any return prescribed by the regulations or who withholds any entry or information required by the regulations to be made or entered in any book, record, or return, or who makes any false or deceptive entry or statement in any such book, record, or return, shall be guilty of an offence against this Act."

1934 A.C. p. 51.

The respondent challenges the validity of the tax on three grounds—namely: *(a)* That in its nature it is either an import duty or a duty of excise, and therefore falls into the category of indirect taxes; *(b)* that it is not direct taxation in respect that the burden may be passed on; and *(c)* that it invades the legislative sphere of the Dominion parliament in regard to regulation of trade and commerce.

The respondent's first contention is that the tax here in question is a customs or excise duty, according to the general understanding current in 1867, and that all customs and excise duties are outside the competence of a Provincial legislature, apart from any question whether the tax is "demanded from the very persons who it is intended or desired should pay it." For this construction he prays in aid s. 122 of the Act of 1867, and, in order to establish that the present tax was in the nature of a customs or excise duty, he relied on the definitions of political economists and the course of custom and excise legislation in this country up to 1867. In their Lordships' opinion this contention is inconsistent with the decisions of this Board, which go back to the year 1878, and have settled that the test to be applied in determining what is "direct taxation" within the meaning of s. 92, head 2, of the Act of 1867 is to be found in Mill's definition of direct and indirect taxes.

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In *Att.-Gen. for Quebec* v. *Queen Insurance Co.* (1), a Provincial tax on policies of assurance was held to be of the nature of a stamp duty and not a licence duty, and to be an indirect tax. The duty was thus described in the judgment of the Board: "They say on the face of the statute, 'the price of each licence shall consist,' and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act." It is difficult to conceive a stamp duty to which such a description would not apply, and the Board found it unnecessary to consider the scientific definition of "direct taxation."

In *Att.-Gen. for Quebec* v. *Reed* (2), a Provincial duty of 10 cents upon every exhibit filed in Court in any action depending therein was held not to be direct taxation, and Mill's definition was applied. Lord Selborne, in delivering the judgment of the Board, said: "The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else . . . . . As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question."

(1) (1878) 3 App. Cas. 1090. (2) (1884) 10 App. Cas. 141 144

It is clear that "ultimate incidence" is not there used in the sense of the political economists, but refers to the ultimate incidence among the parties to the transaction in respect of which the tax is imposed.

Mill's definition was definitely established as the most satisfactory test in *Bank of Toronto* v. *Lambe* (1), in which a Provincial tax on banks varying in amount with the paid-up capital and with the number of their offices, was held to be direct taxation. It may be noted that an argument was unsuccessfully submitted to the effect that the tax would, according to the views of the English legislature, be regarded as a licence or excise duty, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term "direct taxation" in s. 92, head 2. The following passage may be quoted from the judgment of the Board, delivered by Lord Hobhouse: "After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows: 'Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax upon it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.' It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct

(1) (1887) 12 App. Cas. 575.

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tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

"Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act."

On the terms of that judgment it might have been open to the present respondent to maintain that Mill's definition was not the only alternative as a test, but such a contention is excluded by later decisions of the Board, to which their Lordships will next refer.

In *Brewers and Maltsters' Association of Ontario* v. *Att.-Gen. for Ontario* (1), the Liquor Licence Act of Ontario, which required every brewer and distiller to obtain a licence thereunder to sell wholesale within the Province, was held to be intra vires of the Provincial legislature *(a)* as being direct taxation under s. 92, head 2, and *(b)* as comprised within the term "other licences" in head 9 of the same section. There was a uniform fee of $100 in all cases. This decision disposes of any argument that licences were expressly mentioned in head 9, because they are not direct taxation, and would not have been included in head 2. Further, such a duty would be treated for collection as an excise duty in this country. The decision in *Lambe's* case was followed.

In the case of *Cotton* v. *Rex* (2), which related to succession duties, Lord Moulton, in delivering the judgment of the Board pointed out that until the Act of 1867 was passed the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of the colonies was concerned, and that there could not be said to have existed any recognized definition of either class

(1) [1897] A.C. 231. (2) [1914] A.C. 176.

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which was universally accepted; but that, as soon as the Act was passed it became essential that the Courts should, for the purposes of that statute ascertain and define the meaning of the phrase "direct taxation" as used in such legislation. After reviewing the three cases already referred to, Lord Moulton stated "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in s. 92 of the British North America Act, 1867, is substantially the definition quoted above (i.e., in *Lambe's* case) from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

These decisions, in their Lordships' opinion, make clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax. Among the numerous subsequent decisions of the Board, the respondent was only able to refer to two, as containing any suggestion to the contrary—namely, *City of Halifax* v. *Fairbanks' Estate* (1) and *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (2)

In *Fairbanks'* case a city charter, enacted by the Provincial legislature, imposed a "business tax" to be paid by every occupier of real property for the purposes of any trade, profession or other calling carried on for the purposes of gain. Where the property was let to the Crown or to any person exempt from taxation, the owner was to be deemed to be the occupier, and was to be assessed for business tax according to the purposes for which it was occupied. The property in question was let to the Crown, and the respondent estate, as owner, had been assessed to the tax. It was held that the tax was direct taxation even though the owner probably would seek to pass it on to the tenant. Lord Cave, who delivered the judgment of the Board, stated in regard to the Act of 1867 (3): "The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this

(1) [1928] A.C. 117. (2) [1930] A.C. 357.
(3) [1928] A.C. 117, 124, 125.

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it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes . . . . On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation."

In this passage Lord Cave is dealing with the argument that the probability of the tax being passed on by arrangement rendered the tax an indirect one, and his rejection of that argument is in conformity with the previous decisions of the Board. As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer. This is brought out in the second paragraph of Mill's definition, and is true of the typical custom and excise duties referred to by Lord Cave. Again, taxes on property and income are imposed in respect of the particular taxpayer's interest in property or the taxpayer's own income, and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists. The decision in *Fairbanks'* case is in accordance with the principles already stated by their Lordships as those to be derived from the earlier decisions of the Board.

In the *McDonald Murphy Lumber Co.'s* case (1) a Provincial tax upon all timber cut in the Province, with a rebate of nearly the whole tax in the case of timber used or manufactured in the Province was held to be in its nature an export tax "levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions." The tax was held to be ultra vires of the Provincial legislature for the reasons stated in the following passages of the judgment of the Board, which was delivered by Lord Macmillan (1): "The appellant admitted that the imposition of customs and excise duties is a matter within the exclusive competence of the Dominion Parliament, as, indeed, plainly appears from s. 122 of the British North

(1) [1930] A.C. 357, 364, 365.

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America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of customs and excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of customs and excise . . . . Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them . . . . While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristics of an indirect tax as defined by authoritative decisions."

1934 A.C. p. 58.

It is clear that this decision applied Mill's definition, as adopted by the previous decisions of the Board, as the test, and that the result was in accordance with those decisions. The present respondent relied on the reference to s. 122 of the Act of 1867 as being of assistance to his argument. In their Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in the judgments in *Fairbanks'*

1934 A.C. p. 59.

case and the *McDonald Murphy Lumber Co.'s* case, are duties which are imposed in respect of commercial dealings in commodities, and they would necessarily fall within Mill's definition of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a licence duty, such as was considered in *Lambe's* case. Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted. Sect. 122 of the Act merely provided for the temporary continuation of the then existing legislation as regards customs and excise, and the respondent was unable to point to anything in that legislation which would fall outside the above definition of customs and excise duties. It follows that the tax here in question must be tested by Mill's definition, as adopted by the decisions of the Board.

Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act.

The last contention of the respondent was that the Fuel-oil Tax Act invaded the province of the Dominion Parliament, in that it regulated trade and commerce. Except that the Act taxes persons in respect of a commercial commodity, which is not produced in its raw state within the Province, there is nothing in the Act to suggest that its purpose was the regulation of trade and commerce, and

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the respondent has to rely on extrinsic circumstances such as the competition of coal in the fuel market. But, if the taxation falls within the terms of s. 92, head 2, that is, if it is direct taxation within the Province in order to raise a revenue for Provincial purposes, and it does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the Province. "If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament" *(Bank of Toronto* v. *Lambe)*. (1) The case of *Lawson* v. *Interior Fruit and Vegetable Committee* (2), affords an interesting contrast, for there, on the face of the statute, the Provincial legislature sought to regulate the import of commodities.

Their Lordships are therefore of opinion that the appeal should be allowed, that the judgments appealed from should be set aside, and that the appellant is entitled to decree for the amount in suit, and their Lordships will humbly advise His Majesty accordingly. The appellant will have the costs of this appeal and his costs in the Courts below.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *White & Leonard.*

(1) 12 App. Cas. 575, 587.

(2) [1931] S.C.R. 357.

[PRIVY COUNCIL.]

J.C.* 1935 June 6.

BRITISH COAL CORPORATION AND OTHERS ..... } PETITIONERS;

1935 A.C. p. 500.

AND

THE KING ..... RESPONDENT.

FROM THE COURT OF KING'S BENCH, QUEBEC.

Canadian Statute 23 & 24 Geo. 5, c. 53, s. 17—Right of appeal to the King in Council—Competency of Dominion Legislature to abrogate the right—Nature of right—Judicial Committee Acts, 1833 and 1844 (3 & 4 Will. 4, c. 41, and 7 & 8 Vict. c. 69)—Powers of Canadian Legislature under British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63)—Effect of Statute of Westminster, 1931 (22 Geo. 5, c. 4).

On a preliminary objection to the competency of a petition for special leave to appeal to the King in Council from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec in a criminal matter on the ground that the petition was incompetent by reason of the prohibition of appeals to His Majesty in criminal matters by the Canadian Statute 23 and 24 Geo. 5, c. 53, s. 17:—

Held, that the petition was incompetent. Before the Statute of Westminster, 1931 (22 Geo. 5, c. 4), the Canadian Legislature was subject to the limitations imposed by the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), by which legislation repugnant to an Act of the Imperial Parliament was declared void, by s. 129 of the British North America Act, 1867 (30 & 31 Vict. c. 3), and also by the doctrine forbidding extra-territorial legislation. These limitations were abrogated by the Statute of Westminster. The extent of the legislative competence conferred on the Canadian Legislature in regard to appeals to the King in Council in criminal matters must now be ascertained from its constituent Act, the British North America Act, 1867. The right of appeal to the King in Council is a prerogative right, and the prerogative cannot be restricted or qualified save by express words or necessary intendment. Sect. 91 of the Act read with the rest of the Act, not by express words, but by necessary intendment, does invest the Canadian Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters. Appeal to the King in Council is prohibited in precise words by s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53.

Nadan v. *The King* [1926] A.C. 482 explained.

Nature of the prerogative appeal and functions of the Judicial Committee under the Judicial Committee Acts, 1833 and 1844 (3 & 4 Will. 4, c. 41, and 7 & 8 Vict. c. 69), explained. 1935 A.C. p. 501.

Cushing v. *Dupuy* (1880) 5 App. Cas. 409; *Attorney-General for Ontario* v. *Reciprocal Insurers* [1924] A.C. 328, 348; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Attorney-General for Canada* v. *Cain* [1906] A.C. 542; and *In re Louis Marois* (1862) 15 Moo. P.C. 189 referred to.

Petition for special leave to appeal dismissed.

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* *Present:*—VISCOUNT SANKEY L.C., LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, and LORD WRIGHT.

J.C. 1935

BRITISH COAL CORPORATION v. THE KING.

PETITION for special leave to appeal.

The British Coal Corporation and four other coal importing companies were convicted on a charge of combining together with a view to unduly restraining the coal industry by the King's Bench (Crown Side) on December 12, 1933. An appeal from the conviction was dismissed by the King's Bench (Appeal Side) of the Province of Quebec on October 5, 1934.

On a petition for special leave to appeal from this judgment to His Majesty in Council, objection was taken to the competency of the petition on the ground that appeals to His Majesty in Council in criminal cases from any judgment or order of any Court in Canada were effectively prohibited by 23 & 24 Geo. 5, c. 53, s. 17 (Canada).

On this preliminary objection:

1935. March 18, 19, 21, 28, 29; April 1, 2, 8, 9. *Wilfrid Greene K.C.*, *Burchell K.C.* (Nova Scotia), *J. H. Stamp*, and *Oyler* (Nova Scotia) for the petitioners. Before the Statute of Westminster, 1931, was passed there was in the Criminal Code of Canada a section which purported to take away in criminal matters the right of appeal to His Majesty in Council. In *Nadan* v. *The King* (1) it was held that that section was beyond the competence of the Dominion Legislature and was inoperative. After the Statute of Westminster the section was repealed and re-enacted by s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53. In so far as this Statute purports to prohibit appeals to the King in Council in criminal matters it is incompetent. The right to entertain appeals from Courts in the King's Dominions and Colonies is a prerogative right of the King as the fountain of justice inherent in the Crown and inseparable from it: *Christian* v. *Corren*. (2) It is vested in the King as sovereign of the Empire and not in the King in right of the particular Dominion or Colony concerned. It is exercised by the King in his Privy Council on the advice of the Judicial Committee and not by the King in the Privy Council or other Council of a Dominion or Colony: *Performing Right Society Ld.* v. *Bray U.D.C.* (3) This prerogative remains vested in the King save in so far as it has been taken away or diminished by or under

1935 A.C. p. 502.

(1) [1926] A.C. 482. (2) (1716) 1 P. Wms. 329, 330.
(3) [1930] A.C. 377, 396.

the authority of an Act of the Imperial Legislature. In order to take away or diminish this prerogative or to empower a Dominion or Colonial Legislature to take it away or diminish it there must be express words or necessary implication: *Cuvillier* v. *Aylwin* (1); *Theberge* v. *Laudry* (2); *Cushing* v. *Dupuy* (3); *Moses* v. *Parker* (4); *Attorney-General* v. *Constable* (5); *Ex parte Postmaster-General In re Bonham* (6); *Webb* v. *Outrim* (7); Maxwell on Interpretation of Statutes, 2nd ed., 117-132. The only instances in which this prerogative has been taken away or diminished, or power has been given so to do, are the Commonwealth of Australia Act, 1908, and the Union of South Africa Act, 1909, where express words are used.

Under the British North America Act, 1867, it was never within the competence either of the Dominion or of the Provincial Legislatures to take away or diminish this prerogative. Express words and necessary implication are both lacking. The words "peace, order and good government of Canada" are insufficient for the purpose, the King's prerogative right to hear appeals being a right vested in the sovereign outside and paramount to the Dominion. The words "procedure in criminal matters" in s. 91, sub-s. 27, are confined to procedure in the Courts of Canada, and are not apt to describe appeals to the King in Council: *Nadan* v. *The King.* (8)

The Statute of Westminster contains no words which expressly or by necessary implication confer power to take away or diminish this prerogative. The preamble embodying the Resolutions and Declarations of the Imperial Conferences of 1926 and 1930 contains no suggestion that it was one of the objects of the Act to confer such a power; on the contrary it shows plainly that it was not one of the objects. In a matter of such far-reaching constitutional importance direct authority would be given or none at all: *Webb* v. *Outrim* (9); *Viscountess Rhondda's Claim.* (10) The first part of s. 2, sub-s. 2, is merely a reversal of s. 2 of the Colonial Laws Validity Act, 1865, and is not sufficiently precise to cover this prerogative. The latter

1935 A.C. p. 503.

(1) (1832) 2 Knapp, 72.
(2) (1876) 2 App. Cas. 102.
(3) 5 App. Cas. 409.
(4) [1896] A.C. 245.
(5) (1879) 4 Ex. D. 172.
(6) (1879) 10 Ch. D. 595.
(7) [1907] A.C. 81.
(8) [1926] A.C. 482, 492.
(9) [1907] A.C. 81, 91.
(10) [1922] 2 A.C. 339, 365, 375.

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part does not apply to this prerogative, because it does not arise under any Act of Parliament of the United Kingdom or any order, rule or regulation made under any such Act, but exists by virtue of the common law, although it is regulated by the Judicial Committee Acts so far as they extend and so long as they are in force. Sect. 3 merely declares to be non-existent or removes a fetter on its legislative power in respect of matters within its competence (1929, Conference Report, p. 16, para. 38; *Macleod* v. *Attorney-General for New South Wales* (1); *Croft* v. *Dunphy* (2), which suggests that the section is really declaratory). Both on general principles and by reason of s. 7, sub-s. 3, the Statute does not empower either the Dominion or the Provinces to legislate in respect of matters previously outside their competence.

The Statute of Westminster does not affect the construction of the British North America Act, 1867. To construe the Statute as giving to the Dominion power to take away the right of appeal from a Provincial Court in a criminal matter is in effect to alter the British North America Act and depart from the federal bargain by giving to the Dominion a new power to deprive the inhabitants of the Provinces of a right which they enjoyed under the British North America Act and as subjects of the King. If the Dominion has by virtue of the Statute power to take away the right of appeal in criminal matters, it also has power to take away the right of appeal from the Supreme Court. Under s. 101 of the British North America Act this right of appeal to the King in Council necessarily came into existence upon the creation of the Supreme Court, and its destruction would involve an alteration of the British North America Act and a departure from the federal bargain to the prejudice of the Provinces.

1935 A.C. p. 504.

Sect. 129 prohibits the repeal of pre-confederation Imperial Statutes extending to Canada. Among these statutes were the Judicial Committee Acts and accordingly it was never within the competence either of the Dominion or any Provincial Legislature to repeal those Acts. The repeal of those Acts would be a violation of sub-ss. 1 and 3 of s. 7 of the Statute of Westminster.

(1) [1891] A.C. 455. (2) [1933] A.C. 156.

The Judicial Committee Acts do not destroy the prerogative nor do they embody it in statutory form—they recognize its existence but provide a new statutory body to hear appeals and advise the King. The order allowing the appeal is still made by the King in Council by virtue of the prerogative and not by virtue of any statutory power under the Acts. Neither s. 2 nor s. 3 of the Statute of Westminster empowers a Dominion Legislature to repeal or affect the Judicial Committee Acts in so far as they relate to the hearing of appeals by the Judicial Committee or the making of orders by the King in his Privy Council. Even if this be not so, the effect of repealing the Judicial Committee Acts in so far as they are part of the law of the Dominion leaves unimpaired the prerogative right of the King which existed before the passing of those Acts to direct his Courts of justice and his Governors in his Dominions to give effect to his orders as provided in the common form of Order in Council: *Attorney-General* v. *De Keyser's Royal Hotel, Ld.* (1); *In re Barnett* (2); *Mayor of New Windsor* v. *Taylor.* (3)

The Canadian Statute now in question does not purport to repeal the Judicial Committee Acts in so far as they are part of the law of Canada, i.e., it does not attack the prerogative through its local machinery but attacks the prerogative itself. It cannot be assumed that it would attack the local machinery if satisfied that the prerogative was outside its powers.

1935 A.C. p. 505.

Hon. Sir Stafford Cripps K.C. and *Radcliffe K.C.* for the Attorney-General for Quebec; *Tilley K.C.* and *Read K.C.* (Nova Scotia) for the Attorney-General for Canada.

The right to entertain appeals from Courts in the King's Dominions and Colonies was originally a prerogative right of the King. This right, in common with all other forms of prerogative right, is subject to the power of any Legislature that has for the time being the constitutional power to control it. By the Judicial Committee Acts, 1833 and 1844, this part of the prerogative was put into statutory form. These Acts made it impossible for the King to rely on this prerogative in place of his statutory right: *Attorney-General* v. *De Keyser's Royal Hotel, Ld.* (4); and the jurisdiction of the Judicial Committee to

(1) [1920] A.C. 508, 539.
(2) (1844) 4 Moo. P.C. 453, 458.
(3) [1899] A.C. 41.
(4) [1920] A.C. 508.

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hear appeals from any Dominion depends upon the continued operation in that Dominion of these Acts. The true question is, therefore, whether the Canadian Legislature has power to repeal or amend the Judicial Committee Acts in relation to criminal appeals from Canada. Express words or necessary implication is required to affect the prerogative in a municipal statute, but there is no authority for saying that this is required in a statute conferring constitutional powers. In the latter prerogative rights are necessarily affected by implication in conferring legislative and executive powers. Plenary powers are implied in the words "peace, order, and good government." The control of the prerogative right to hear appeals in s. 74 of the Commonwealth of Australia Act, and s. 106 of the Union of South Africa Act, is treated as within the legislative powers given in ss. 51 and 59 respectively to legislate for "peace, order and good government." If, however, ss. 74 and 106 respectively are regarded as positive enabling provisions, they were necessary to override the Judicial Committee Acts and not to overcome any supposed lack of authority to deal with the prerogative. In the British North America Act competence to deal with the prerogative is conferred by s. 91. It is implied in the power to legislate for "peace, order, and good government of Canada, in relation to all matters . . . . coming within the classes of subjects" . . . ., which includes (27) The criminal law and procedure in criminal matters. The words "peace, order and good government" authorized the widest discretion of enactment: *Riel* v. *The Queen.* (1)

1935 A.C. p. 506.

In the Instructions to Governors and the Acts before 1867 the power of the Canadian Legislature to affect the prerogative by virtue of its general powers was assumed, the prerogative being safeguarded either by the device of reservation or express exception. The plenitude of the sovereignty of the Dominion and Provincial Legislatures in their respective spheres and their power to affect the prerogative has been recognized: *Hodge* v. *The Queen* (2); *Attorney-General for Ontario* v. *Attorney-General for Canada* (3); *Maritime Bank of Canada* v. *Receiver-General of New*

(1) 10 App. Cas. 675, 678. (2) 9 App. Cas. 117.
(3) [1912] A.C. 571.

Brunswick (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2); *Attorney-General for Canada* v. *Cain* (3); *Bonanza Creek Gold Mining Co. Ld.* v. *The King* (4); *Attorney-General for Nova Scotia* v. *Legislative Council of Nova Scotia* (5); *Croft* v. *Dunphy*. (6)

Before the Statute of Westminster the power of the Dominion Parliament to legislate with regard to criminal appeals to His Majesty in Council was fettered by (1.) the Colonial Laws Validity Act, 1865; (2.) possibly, though this is not conceded, by s. 129 of the British North America Act, 1867; and (3.) the doctrine of extra-territorial limitation. *Nadan* v. *The King* (7) was decided on two grounds: (*a*) the Dominion Parliament could legislate only for "action to be taken in the Dominion," and (*b*) the Colonial Laws Validity Act avoided any legislation inconsistent with the Judicial Committee Acts. The proposition that if the prerogative is to be excluded that must be accomplished by an Imperial Statute (8) is only deduced from the previous proposition that the Act of 1867, having regard to the first ground, had not given the necessary power.

1935 A.C. p. 507.

The Resolutions and Declarations of the Imperial Conferences of 1926 to 1930 (to which reference was made) are sources of the highest importance from which to ascertain the law of the Constitution. Constitutional usage which a court of law would recognize as binding is Constitutional Law. By this law Great Britain and the Dominions are autonomous communities equal in status. The Statute of Westminster must be construed with regard to this position. The object of the Statute was to give or extend legislative powers in the Dominions irrespective of the consequences. The combined effect of s. 2, sub-s. 2 and s. 3 is to remove all existing fetters on the legislative competence of the Dominion Parliament to deal with appeals to His Majesty in Council in criminal matters.

The Statute alters the British North America Act, 1867, in that it releases the appropriate Legislatures from disability, if any, under s. 129 to make laws repugnant to Imperial Acts. Sect. 7, sub-s. 1, of the Statute does not

(1) [1892] A.C. 437.
(2) [1898] A.C. 247.
(3) [1906] A.C. 542.
(4) [1916] 1 A.C. 566.
(5) [1928] A.C. 107.
(6) [1933] A.C. 156.
(7) [1926] A.C. 482.
(8) [1926] A.C. 493.

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say that the Statute itself does not affect the British North America Act. What it says is that a repeal, alteration or amendment of the British North America Acts, 1867 to 1930, by any subsequent Act of the Dominion Parliament is not to derive validity from the Statute. Sect. 7, sub-s. 3, merely preserves the balance of powers between the Dominion and Provincial Legislatures which is established by the British North America Act.

The prerogative as to hearing of appeals was embodied in and superseded by the Judicial Committee Acts, and under the Statute of Westminster, s. 2, sub-s. 2, the Canadian Parliament is empowered to deal with the situation as it pleases. If the matter is still one of prerogative right the Canadian Parliament under the British North America Act, 1867 (30 & 31 Vict. c. 3), had power to deal with it so long as any alteration made was not repugnant to an Imperial Statute, and that restriction has now been removed.

1935 A.C. p. 508.

Sir Thomas Inskip A.-G. (with him *Wilfrid Lewis*), on invitation, to assist the Board. *Nadan* v. *The King* (1) was decided on two grounds: (1.) repugnancy of the Canadian Act to Imperial Acts, and (2.) its incompetence by reason of its extra-territorial effect. On the second ground the wrong view was taken in treating special leave to appeal as not being an action in the Dominion. Only geographically is the Privy Council a Court of Great Britain: observations of Lord Haldane in *Hull v. McKenna.* (2) The development of the constitution in relation to the Dominions is illustrated by *In re Regulation and Control of Radio Communication in Canada.* (3) As soon as the Parliament of a Dominion has power to deal with a subject as a sovereign power, its Acts are as effective as those of the Parliament of Great Britain: *Webb* v. *Outrim.* (4) The question in *Cushing* v. *Dupuy* (5) was whether the prerogative was dealt with, not what powers were conferred by the Imperial Legislature. Until *Nadan's* case (1) there was no authority that express words in an Imperial Act are necessary to affect the Royal prerogative. In *Nadan's* case (1) it was the language of the colonial Act that was examined. If "peace, order and good

(1) [1926] A.C. 482.
(2) [1926] I.R. 402.
(3) [1932] A.C. 304.
(4) [1907] A.C. 81, 88.
(5) 5 App. Cas. 409.

government" under the British North America Act includes the power to deal with the legal rights of citizens, no express words or necessary intendment in the Statute of Westminster, 1931 (22 Geo. 5, c. 4), dealing with the prerogative are required.

Wilfrid Greene, K.C. in reply. If the respondent's contention is right, the right of appeal in civil cases from the Provinces can be taken away by the Dominion Legislature, and it is impossible to read the Statute of Westminster as having this result, particularly in view of the proceedings of the Imperial Conferences recited in the preamble.

[Reference was made to Dicey's Law of Constitution, 8th ed., pp. 39, 62, 66, and to the difference between conventions and law, Ibid. p. 413.] The Judicial Committee Acts were not substituted for the Royal prerogative. They left it untouched, merely prescribing the manner in which it was to be exercised. The general power to legislate for "peace, order, and good government" does not include the power to deal with the prerogative. 1935 A.C. p. 509.

June 6. The judgment of their Lordships was delivered by

VISCOUNT SANKEY L.C. This is a petition for special leave to appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, delivered on October 5, 1934. The petitioners had been convicted on December 12, 1933, under s. 498 of the Canadian Criminal Code and under ss. 2 and 32 of the Combines Investigation Act, 1923, before the Court of King's Bench (Crown Side) and had been subjected to fines totalling $30,000, but the more serious effect to the petitioners of the conviction was that their business operations in the import of British anthracite coal were held to be illegal. The conviction was upheld by the judgment of the Appeal Court.

Before their Lordships proceeded to consider questions appertaining to the merits of the petition, they decided in the first instance to determine a preliminary objection, which was that the petition was incompetent by reason of the provisions of s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53 (an Act to amend the Criminal Code), which was in the following terms: "Sub-s. 4 of s. 10 of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows:—

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"(4.) Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard."

It is clear that if this enactment is valid, the petition is barred. It is, however, contended on behalf of the petitioners that the section is invalid. A section in identical terms had been held invalid by the Judicial Committee in *Nadan* v. *The King* (1), and that decision was founded upon in these proceedings by the petitioners, who contended on various grounds that the enactment of the Statute of Westminster, 1931, had not affected the position which the decision just cited had established. On behalf of the respondent it was argued that the Statute of Westminster, 1931 (which will be referred to here as "the Statute"), had removed certain fetters which according to that decision had till then affected the legislative competence of Canada in the relevant respects, and that, these fetters being removed, the provisions of the British North America Act of 1867 had full effect to invest the Parliament of Canada with power to enact the section in question.

1935 A.C. p. 510.

It will be convenient to summarize in the briefest terms the nature of the appeal from Dominion or Colonial Courts to His Majesty in Council. The position of this Board, the Judicial Committee of the Privy Council, in relation to such appeals may first be indicated. The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will. 4, c. 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. It contains (inter alia) the following recital: "And whereas, from the decisions of various courts of judicature in the East Indies, and in the plantations, and colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council." The Act then provides for the formation of a Committee of His Majesty's Privy Council, to be styled the Judicial Committee of the Privy Council, and enacts that "all appeals or complaints in the nature of appeals whatever, which either by virtue

(1) [1926] A.C. 482.

of this Act or of any law, statute or custom may be brought before His Majesty in Council" from the order of any Court or judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court. The Act contained a great number of provisions for the conduct of appeals. It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

1935 A.C. p. 511.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

A later Act, the Judicial Committee Act, 1844, must next be mentioned. Apart from certain changes in procedure, the main effect of that Act was to authorize Her Majesty to provide, by Order or Orders in Council made for that purpose, for the admission of any appeals to Her Majesty in Council from judgments or orders of any Court of justice within any British Colony or possession abroad even though such Court might not be a Court of Error: this followed a recital that by the laws in force in certain of Her Majesty's Colonies no appeal could be brought save only from Courts of Error or of Appeal and that it was expedient to provide that Her Majesty in Council should be authorized to admit such appeals. In effect therefore Her Majesty in Council was thus empowered to override a Colonial law limiting or excluding appeals to Her Majesty in Council from any colonial Court.

In this way the functions of the Judicial Committee as a Court of law were established. The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant

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special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a residuum of the Royal prerogative of the sovereign as the fountain of justice. In early days it was to the King that any subject who had failed to get justice in the King's Court brought his petition for redress. As time went on, such petitions were brought to the King in Parliament (which was the origin of the modern judicial functions of the House of Lords) or to the King in his Chancery (from which flowed the jurisdiction of the Court of Chancery). But this was so only in causes which had been dealt with in English Courts: from the Courts of the Channel Islands and later from the Courts of the Plantations or Colonies the petition went to the King in Council, and this continued to be the practice after the jurisdiction of the Privy Council in English common law cases had been abolished. It was this appellate jurisdiction (along with other jurisdictions such as in Admiralty or Ecclesiastical Causes) which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

In 1865 the Colonial Laws Validity Act was passed. It was described as an Act to remove doubts as to the validity of Colonial Laws: for this context it is enough to say that it was an Act which declared that a colonial law should be deemed to be and to have been void to the extent that it was repugnant to any Act of the Imperial Parliament extending to the colony or any order or regulation made under such Act.

In 1867 the British North America Act (hereinafter called "the Act") was passed. It was an Act to provide for the establishment in Canada of one Dominion and for the Legislative Authority in the Dominion and to declare the nature of the executive government therein. It was declared that

the executive government of and over Canada should be vested in the Queen, and that there should be a Council (the Queen's Privy Council in Canada) to aid and advise in the government of Canada. The legislative power was vested in the Parliament for Canada, which by s. 91 was to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by s. 92 exclusively to the Legislatures of the Provinces: without restricting the generality of that provision, certain matters were specifically enumerated as falling within the exclusive legislative authority of the Parliament of Canada: of these it is sufficient here to mention No. 27, which was "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters." On the other hand, among the matters assigned by s. 92 exclusively to the Provincial authority there fell No. 14: "The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." By s. 101 of the Act it was provided: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada." Under the last mentioned section the Parliament of Canada by an Act of 1875 established (along with the Exchequer Court) "The Supreme Court of Canada" which was to exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada: it was provided by s. 47 that "the judgment of the Supreme Court should be in all cases final and conclusive . . . . Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."

1935 A.C. p. 513.

In 1880 in the case of *Cushing* v. *Dupuy* (1), which was an appeal from the Court of Queen's Bench for Quebec, the Judicial Committee had to consider the effect of a Dominion Act dealing with insolvency, which contained a clause providing that "the judgment of the Court to which under this section the appeal can be made shall be final."

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(1) 5 App. Cas. 409.

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That Court in the case in question was the Court of Queen's Bench for Quebec. The Judicial Committee decided that as the Act in question "contains no words which purport to derogate from the prerogative of the Queen to allow as an act of grace appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it." But they added that they did not consider it necessary "to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative."

In 1888 a section identical in terms with the section now in question was enacted as s. 1025 of the Criminal Code of Canada. Between that year and 1926 appeals came before the Board in which the question of the validity of that section might have been raised but was not or, if it was raised, was not the subject of decision. To take one instance, in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) the Judicial Committee said that their order "involved no decision as to the power of the Parliament of Canada to enact s. 1025 of the Criminal Code."

But in 1926 in the case of *Nadan* v. *The King* (2) a decision was for the first time given on the question whether the section was valid. It was held that the section was ultra vires and invalid. It is essential, however, to determine the ratio decidendi on which this judgment was based. The ratio decidendi is, in their Lordships' opinion, to be found in a comparatively short passage which follows a citation of the Privy Council Acts of 1833 and 1844, and which is of so vital an import that it must be here quoted in full:—

"Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however

1935 A.C. p. 515.

(1) [1924] A.C. 328, 348. (2) [1926] A.C. 482, 492, 495.

widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that 'any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106."

The judgment then goes on to review a number of authorities and thus concludes: "Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion."

1935 A.C. p. 516.

On a careful consideration of the judgment of the Board in *Nadan's* case, their Lordships are of opinion that the judgment was based on two grounds only: (1.) that s. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865; (2.) that it could only be effective if construed as having an extra-territorial operation, whereas according to the law as it was in 1926 a Dominion statute could not have extra-territorial operation. These two difficulties as

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the law then stood could only be overcome by an Imperial statute: the Australian and South African Acts were cited as illustrations of Imperial statutes containing clauses apt to define or limit this prerogative. Such, their Lordships think, is the meaning of the decision in *Nadan's* case: they do not find in it any clear or precise determination of what, if these two fundamental difficulties had been removed, would have been held to have been the true effect of the Act, nor can their Lordships say how, apart from these objections, the Judicial Committee would have decided the issue whether or not the Act had given the Canadian Legislature power to enact s. 1025.

Their Lordships have now to decide that very same question and to decide it, as they conceive, without any direct help or guidance from earlier decisions of the Judicial Committee, now that the Statute has removed the two difficulties which were decisive in *Nadan's* case. The relevant clauses of the Statute which have this effect are as follows:—

"2.—(1.) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

"(2.) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

1935 A.C. p. 517.

"3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

"7.—(1.) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

"(2.) The provisions of section 2 of this Act shall extend to the laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

"(3.) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

What is the extent of the legislative competence in the relevant regard conferred on the Canadian Parliament, putting out of question the limitations which are now removed, must be ascertained from the words of the constituent Act. In construing the words of that Act, it must be remembered what the nature and scope of the Act are. They are indicated in the words used by Lord Loreburn L.C. in delivering the judgment of the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1): "In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

The same principle was recognized in the following language used in *Hodge* v. *The Queen* (2) in respect of the powers of Provincial Legislatures: "When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority

1935 A.C. p. 518.

(1) [1912] A.C. 571, 581. (2) 9 App. Cas. 117, 132.

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to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

The same language can properly be used in regard to the Dominion Parliament, to which indeed the passage just quoted was applied in *Attorney-General for Canada* v. *Cain*. (1) That was a case in which it was held that the power to make laws for the peace, order and good government were wide enough to enable the Dominion Parliament to pass a statute vesting in the Dominion Executive the prerogative power to expel and deport aliens. Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards* v. *Attorney-General for Canada* (2): "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony': see Clement's Canadian Constitution, 3rd ed., p. 347."

1935 A.C. p. 519.

No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms or by necessary

(1) [1906] A.C. 542. (2) [1930] A.C. 124, 136.

intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by necessary intendment. In the matter now in question it is beyond question that s. 17 of the Canadian Act is expressed in precise terms. The next question is whether s. 91 of the Act invests the Dominion Parliament, in cases within its jurisdiction, with the power to regulate or prohibit the appeal to the King in Council. Their Lordships are of opinion that the Act does invest the Dominion Parliament with these powers. It does not indeed do so by express terms, but it does so by necessary intendment. Sect. 91 of the Act, read along with the rest of the Act, is, according to its true construction in their Lordships' opinion, apart from the limitations already referred to, intended to make and is apt to make the Dominion Legislature supreme and endow it with the same authority as the Imperial Parliament, within the assigned limits of subject and area, just as it was said in *Hodge* v. *The Queen* (1) that s. 92 of the Act had that effect in regard to the Provincial Legislatures. It is true that before the Statute, the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by s. 129 of the Act, and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute, a section which excludes from the competence of the Dominion and Provincial Parliaments any power of "repeal, amendment or alteration" of the Act. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities. In truth Canada is in

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(1) 9 App. Cas. 117.

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enjoyment of the full scope of self-government: its Legislature was invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the two fetters which have already been discussed.

Among the powers which go to constitute self-government there are necessarily included powers to constitute the Law Courts and to regulate their procedure and to appoint their judges: save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice: but by the Act these powers are vested in the Dominion Legislature, and thus pro tanto the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the case may be. Even conditions of the appeal "as of right" to the Privy Council have been dealt with by the Parliaments of Quebec and Ontario, acting under the powers vested in them under the Constitutional Act, 1791.

1935 A.C. p. 521.

It may now be considered whether there is since the Statute any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as according to the contentions on behalf of the petitioners it should be treated, as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian Courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime

element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

1935 A.C. p. 522.

Their Lordships can see no valid reason since the Statute why the power to regulate or prohibit this type of appeal should not be held to be vested in the Dominion Parliament by the Act, with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships do not construe the decision in *Nadan's* case (1) as involving the negation of that general power: the view there stated that the prerogative power to admit appeals could only be abrogated by an Imperial Statute was in their Lordships' opinion based on the special grounds that it would affect matters not confined locally to Canada and would contravene an Imperial Act. Before 1867, it had been held in *Cuvillier* v. *Aylwin* (2) that the Constitution Act of 1791 had conferred power on the Canadian Legislature to take away the prerogative right of appeal: that decision was indeed criticized in the case of *In re Louis Marois* (3), but the ground of actual criticism or perhaps dissent was not based on the general limits of power of the Canadian Legislature, but on the view that the relevant enactment of that Legislature was not sufficiently express in its terms: after 1867 the same ground for denying the validity of the enactment there in question was taken in *Cushing* v. *Dupuy* (4), as already explained.

(1) [1926] A.C. 482.
(2) 2 Knapp, 72.
(3) 15 Moo. P.C. 189.
(4) 5 App. Cas. 409.

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It was further contended on behalf of the petitioners that if the Imperial Parliament desired to regulate in a constitutional enactment the prerogative right of petitioning for leave to appeal to the King in Council, an entirely different method of dealing with the problem was adopted, as was done in s. 74 of the Commonwealth of Australia Act, 1900, and in the South African Act. It is difficult to see how light can be thrown on the construction of the Act of 1867 by comparing an entirely different Act of 1900. But in any case the contrary argument may be drawn from the Commonwealth Act: the truer view may well be that the express limitation inserted in the Act of 1900 was so inserted because the general powers conferred on the Commonwealth by that Act would have included the abrogation of the prerogative appeal if the specific limitation had not been expressed. But it is to be noted also that the Commonwealth was invested with power to alter or amend the provisions of the Commonwealth Act relating to the prerogative appeals. A similar power is given in the South African Constitution. In the Report of the Imperial Conference, 1926, at p. 19, it is stated that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals (i.e., to the Judicial Committee of the Privy Council) should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

1935 A.C. p. 523.

Their Lordships have in this judgment been dealing only with the legal position in Canada in regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases.

For all these reasons their Lordships are of opinion that the petition should be dismissed. As they are of this opinion on the sole ground that the petition is barred by s. 17 of the amended Criminal Code, it is not necessary to discuss the merits of the petition.

In the result their Lordships, being of opinion that the petition should be dismissed, will humbly so advise His Majesty.

Solicitors for petitioners: *Clifford-Turner & Co.*

Solicitors for respondent: *Blake & Redden.*

Solicitors for Attorney-General of Canada: *Chas. Russell & Co.*

[PRIVY COUNCIL.]

J.C.* 1934 July 12.

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CANADIAN ELECTRICAL ASSOCIATION AND OTHERS..... } APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS AND OTHERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railways—Powers of Railway Board—Electric lines and cables along and across railways—General Order of Board—"Terms and conditions"—Order indemnifying Railway Company—Property and Civil Rights—Railway Act (R.S. Can., 1927, c. 170), s. 372.

By s. 372 of the Railway Act of Canada the Board of Railway Commissioners, when granting the leave thereby required to construct or maintain telegraph or telephone wires or appliances, or electric power cables, along or across a railway, may order on what "terms and conditions" the work may be executed; and leave is not to be necessary when works have been, or are to be, constructed or maintained by consent, and in accordance with general orders approved by the Board for that purpose. 1934 A.C p. 552.

Acting under the above section, the Board issued a general order (No. 490), which provided by clause 2: "The applicant shall, at all times, wholly indemnify the company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the applicant's wires or cables or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere":—

Held, that the effect of the above clause of the order was merely that the applicants were to indemnify the railway company against claims, maintainable by third parties against the company under the general law, by reason of the existence of the authorized works; and that so construed it was within the competence of the Board of Railway Commissioners.

The Parliament of Canada, for the purpose of securing effective railway administration, may encroach upon the Provincial domain in respect of property and civil rights, but Parliament does not appear to have delegated that legislative power to the Board of Railway Commissioners, unless possibly by s. 34, sub-s. 3, of the Act.

Quære, whether s. 39 of the Act can be treated as supplemental to s. 372.

Judgment of the Supreme Court of Canada, [1932] S.C.R. 451, affirmed.

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* *Present:*—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD MACMILLAN, and LORD ALNESS.

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CANADIAN ELECTRICAL ASSOCIATION v. CANADIAN NATIONAL RAILWAYS.

APPEAL (No. 26 of 1933) by special leave from a judgment of the Supreme Court of Canada (March 31, 1932).

The appeal was as to the validity of a general order, dated February 20, 1931, and made by the Board of Railway Commissioners in exercise of their powers under s. 372 of the Railway Act (R.S. Can., 1927, c. 170). The order prescribed conditions under which electric telegraph and telephone wires, electric power cables, and other electrical appliances, might be carried along or across a railway, otherwise than by the railway company owning or controlling the railway.

The Railway Board, upon an application under s. 52, sub-s. 3, of the Act, granted the applicants leave to appeal to the Supreme Court of Canada upon the question whether the order was within the jurisdiction of the Railway Board. That Court by a majority (Duff, Lamont and Smith JJ.; Rinfret and Cannon JJ. dissenting) held that the Railway Board had jurisdiction. The appeal is reported at [1932] S.C.R. 451.

1934 A.C. p. 553.

1934. March 15, 16. *Pritt K.C.* and *Frank Gahan* for the appellants.

Tilley K.C. for the respondents.

July 12. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This is an appeal by special leave from a majority judgment of the Supreme Court affirming the legality of a regulation of the Board of Railway Commissioners of Canada propounded by a majority vote of that Board. The difficulty of the question raised may be properly gauged, in this instance, by the divergence of administrative and judicial opinion already manifested with reference to it. Its widespread importance to electrical power companies and similar organizations throughout Canada on the one hand and to the Dominion railways on the other may in like manner be judged by the widespread and representative interests of the parties to the dispute. There are ranged on one side as appellants, first, the Electrical Association of Canada, with a membership comprising public utility companies engaged in the production and transmission of electrical power for commercial and private consumption throughout the whole Dominion, all of them, whether

incorporated under Dominion or Provincial legislation, having full charter or statutory powers to erect and maintain the overhead transmission lines necessary for the distribution of their power. As second appellants there appear the Hydro Electric Power Commission of Ontario, a provincial government commission similarly engaged in the production and transmission of electrical power. Against these appellants are to be found as respondents the Canadian National Railways, the Canadian Pacific Railway Company, the Michigan Central Railroad Company and the Railway Association of Canada. The contest, indeed, is one between two sets of public utility organizations, Dominion wide in their operations, and it concerns the adjustment of rights and liabilities between them in respect of a matter of great importance to both: that is to say, in respect of the wires for the transmission of electricity for light, power or other purposes carried by the appellants and other like undertakers along or across the lines of the Dominion railways.

Under the Dominion Railway Act it is the Railway Commissioners to whom is assigned the duty of dealing with applications by power companies and others for licences to carry their wires along or across the lines of the railways under their jurisdiction. Without such a licence and in the absence of such agreement as is permitted by the Act no such wires may be lawfully so carried. It has been the practice of the Commissioners to issue general orders containing regulations with reference to this matter. One such general order—(No. 231)—was promulgated by them in 1918. This order was in 1920 amended by another, numbered 230; and on February 20, 1931, was further amended by general order, numbered 490, containing the regulation with reference to which the present question arises. The strongest exception to this new regulation is taken by the appellants. The Commissioners have thereby, they complain, sought to impose upon every successful applicant for a licence to carry overhead electrical wires across or along a railway a liability to the railway company concerned both oppressive and exceptional. The question they raise is whether the imposition of such a liability by such a regulation can legally be justified by reference to any powers of the Commissioners under the statute.

The appellants questioned the legality of the regulation when its publication was under consideration. On its

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promulgation they were given leave by the Commissioners to refer the question of its legality to the Supreme Court to which in due course this question was propounded: "As a matter of law had the Board jurisdiction to make general order No. 490 dated February 20, 1930?"

To that question as has already been indicated the Supreme Court in a judgment delivered on March 31, 1932, by a majority returned an affirmative answer. Hence the present appeal.

It will be found that although the question put to and answered by the Supreme Court was quite general in its terms, the particular regulation of the order which has already been referred to and is set forth below, was then and is now alone in question. The competence of the Board in regard to the other provisions of a very elaborate general order has not been challenged.

Until another view was suggested in the course of the argument at their Lordships' Bar, it has been generally assumed that the existing powers of the Railway Commissioners in this matter are derived exclusively from s. 372 of the Railway Act, 1919. That section with modifications, here immaterial, has had its place in all Railway Acts for many years, and, as it is certainly the main source of the Commissioners' powers, it is convenient to set forth its provisions at once:—

"372. Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in sub-section five of this section be constructed or maintained

(a) along or across a railway by any company other than the railway company owning or controlling the railway; or *(b)* across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under s. 367 of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

Before their Lordships proceed to a closer examination of this section in its relation to the problem presented by the new regulation, they may conveniently interpolate one or two general observations as to its structure. It will be noticed that the section, while including within its range applications for leave to construct and maintain across or along a railway electrical lines so diverse as a telephone wire at one end of the scale and a power cable at the other end, deals with all by a form of words made applicable to each indifferently, and whether the structure, be it what it may, is to be situate in a remote corner of the Dominion or in the midst of a crowded urban area. The section nevertheless does not fail to discriminate in a way between what is serious and what is trivial. The railways, as was said in a judgment now over 20 years old, *Maritime Telegraph & Telephone Co.* v. *Dominion Atlantic Ry. Co.* (1), stretching, as they do, over the whole country, of necessity must be crossed from time to time by innumerable telephone and telegraph wires, and to a lesser extent by the wires of electrical power and light companies. It can hardly be doubted that the framers of the section recognized the existence of that state of things, and intended to provide for it. All public utilities must be served, railways not more than others, and the fact that under the section the Commissioners are not in set terms empowered to refuse an application made to them, seems at least to justify the judicial view expressed in the same report, that the issue on every such application must always be

(1) (1916) 20 Can. Ry. Cas. 213.

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how the crossing can properly and safely be made in the particular circumstances of the case under consideration. This necessary distinction of circumstance between one application and another, a distinction to which it may be due regard has not always been had, is in the section revealed, as their Lordships think, by the contrast between "the terms and conditions" of sub-s. 3, on which the execution of any particular proposed works may be permitted, and the "general orders, regulations, plans and specifications" which, under sub-s. 5 are to be adopted and approved by the Board. The "terms and conditions" are those specifically appropriate to the particular case: the "general orders etc." such as are in their terms appropriate either to every case or to specified classes of cases. Accordingly, provided that the provisions of the general order applicable are recognized and observed, the section leaves it to the parties concerned, if they can agree, themselves to fix the terms and conditions upon which particular lines may be carried along or across a railway without either application to or intervention by the Commissioners.

1934 A.C. p. 557.

Now is it possible to find in this any limitation relevant to the present inquiry in the permitted scope of these general orders? It is convenient to put and to seek to answer this question while the section itself is immediately under notice, for the regulation now challenged is contained in a general order promulgated by the Commissioners under this very section, a fact which their Lordships have verified by reference to a full print of the order with which they have been courteously supplied since the hearing.

The question is not easy to answer, so unqualified are the powers of the Commissioners in this matter. But it may perhaps be hazarded that the permission extended to the companies concerned to agree as to the terms and conditions referred to suggests that the general order, which overrides agreement, is not intended to deal ex cathedra with questions which the companies concerned are in such matters left free to adjust for themselves. But is the question immediately relevant now, that of the liabilities inter se resulting from the placing of a company's wires along or across a railway one of the matters capable of being adjusted by agreement? There is much to be said for an affirmative answer. A railway company is permitted by sub-s. 1 (*a*) of the section to carry its own wires over its own lines without control or

1934 A.C. p. 558.

interference by the Commissioners. For these wires the liability must be exclusively its own. There is no one else on whom it can be laid. Again, under sub-s. 5 the leave of the Board is not required for the exercise by a railway company of its powers under s. 367 of the Act, and under that section the company may lease its own telegraph or telephone lines to any companies having telegraph or telephone powers. Quite obviously, it would seem all questions of liability in respect of such lines leased will fall to be regulated by the provisions of the lease and these are left at large. It is however only an inference or by way of analogy that a similar freedom of contract may be presumed to exist where under this sub-section by consent the wires of a company are carried across a railway line, and even if apart from regulation this freedom does exist, their Lordships are not prepared to hold that it may not be controlled by regulations of the Commissioners if they are minded to make them.

The question remains whether a regulation to the same effect may not also be a lawful term or condition imposed under sub-s. 3. To that question, to which on the appeal the main argument has been addressed, their Lordships will come in due course. They proceed now to a closer examination of the terms of the impugned regulation.

The general order in which it is to be found is a republication with amendments of the general orders already referred to. The frame of the original orders remains unaltered: and the only amendment of substance introduced into them is that to which exception is now taken. In order to appreciate the full effect of the amendment it will be convenient first to quote the introductory provisions, Nos. 1 and 3 of the order, which have stood unaltered throughout:—

"1. That the conditions and specifications set forth in the schedule hereto annexed under the heading 'Rules for wires erected along or across railways' be, and the same are hereby adopted and confirmed as the conditions and specifications applicable to the erection placing and maintaining of electric lines wires or cables along or across all railways subject to the jurisdiction of the Board, part 1 being applicable where the line or lines, wire or wires, cable or cables, is or are carried along or over the railway: part 2 being applicable where the line or lines, wire or wires, cable or cables is or are carried under the railway.

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3. That any order of the Board granting leave to erect place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise expressed, be deemed to be an order for leave to erect place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order."

It is made plain by these introductory provisions that the order applies to every kind of electric line wire or cable, and also, what is perhaps for present purposes more important, that while the order is of general application power is reserved to vary its provisions so as to meet the circumstances of any particular case.

The regulation now in question is inserted as condition 2 of Part I. of the schedule relating to overhead wires in place of the same condition as it formerly stood. Conditions 1 and 2 prior to the amendment now challenged of condition 2 were as follows:—

"1. The applicant shall at its or his own expense, erect and place the lines, wires, cables or conductors authorized to be placed along or across the said railway and shall at all times at its own expense maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth so that at no time shall any damage be caused to the company owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables or conductors from sagging below the said height.

1934 A.C. p. 560.

2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables, or any works or appliance herein provided for not being erected in all respects in compliance with the

terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

It is explained by the Commissioners in the judgment propounding their substituted regulation that the railway companies were dissatisfied with these conditions as not sufficiently protective. They complained that while power companies were required under condition 1 to maintain their lines in good order, they were not compelled to indemnify the railway companies against loss occasioned them by failure of the power companies to maintain the lines in such good order. The railway companies moreover had persistently put it forward as their view that the conditions should provide for their indemnification not only in the circumstances already provided for, but for loss or damage however caused. It then appears from the judgment that the railway companies having stated their position as just detailed would have been content with a regulation in place of condition 2, framed as follows:—

"2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against any loss, cost, damage and expense to which the said railway company may be put by reason of any damage or injury to person or property caused by any of the said wires or cables or any works or appliances herein provided for not being erected *and at all times maintained* in all respects in compliance with the terms and provisions of this order as well as any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant." 1934 A.C. p. 561.

As will be seen this is the original condition 2, with the addition of the words italicized "and at all times maintained," and had it been accepted by the Commissioners the present controversy could not have arisen. But it was not accepted, and the explanation by the Commissioners of the condition finally promulgated by them is to be found in this concluding passage of their judgment:

"Regarding as vitally essential the safety of persons outside the circle of either company, and desiring to frame conditions most likely to ensure to them immunity from danger and loss, the Board is of opinion that this result can be best assured by placing upon the shoulders of the company carrying a dangerous load across the right of way,

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a primary obligation to bear it safely across the railway property, unless the negligence of the latter company should operate to cause the power wires to spill their load.

If, therefore, an accident or disability occur due to an escape of electric power and for any reason its cause cannot be definitely located as between the railway company and the power company, the latter should be held responsible for the reason that the loss suffered will have been occasioned by the passage of the power company's wires over or along those of the railway company. If they had not been there the occurrence would not have taken place. The conditions of carrying the power companies' lines across or along the railways should be framed in accordance with what is above stated, that is to say, except in cases where loss or damage to the railway company is directly attributable to any act, default or negligence on the part of such railway company, its agents or employees, the applicant shall at all times wholly indemnify the company owning, operating or using the railway, from and against all loss, cost, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables or any of the works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

1934 A.C. p. 562.

In result, therefore, paragraph 2 of the

STANDARD CONDITIONS AND REGULATIONS FOR WIRE CROSSINGS.

PART I.

Over-Crossings.

'Conditions' will be amended to read as follows":

And then follows the condition, the legality of which is now impugned:—

"2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway from and against all loss, damage, injury and expense to which the

railway company may be put by reason of any damage or injury to persons or property caused by any of the applicant's wires or cables or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere."

It will be noticed that this condition, as actually promulgated while in other respects reproducing textually the words of the oral judgment introducing it, omits the words of exception which their Lordships have underlined above. It is a striking omission, not easy to account for in view of the attitude before the Commissioners of both parties to the dispute and it derives an added importance from the fact that the concluding words of the condition, "unless the cause of such loss cost damage injury or expense can be traced elsewhere," words which possibly have some relation to the subject-matter of the exception, may themselves on a strict construction be quite otiose. For by the condition an applicant is only made liable for damage or injury "caused" by any of his wires or cables and, literally read, the concluding words say no more than that he is not to be liable if the damage or injury is not so "caused." It will be noted also that although in the course of the judgment it is made clear that the amendment of the original condition as asked for by the railways was confined to the wires and cables of power companies and its acceptance was justified by the Commissioners with reference to their wires and cables only, still the condition, as promulgated, extends to all wires covered by the section, that is to say, to telegraph and telephone wires, as well as the wires of the power companies.

1934 A.C. p. 563.

It does not seem however that the legality of the condition as actually amended,—the aspect of it with which their Lordships are alone concerned—is affected by either of these things. It must remain with the Commissioners, should they deem it necessary, to expound its meaning or by amendment to clarify its terms if and when the occasion arises for their so doing.

The construction placed by the appellants upon the new condition is very far-reaching. The amended condition, they say in their printed case: "purports to create in the place of a mere liability for damage caused either by breach of

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the terms and conditions of the Order or by negligence of the power companies a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the power lines. . . . . A burden," they add later, "which the power company is not called upon to bear under the general law in force in any of the Provinces of Canada with respect to responsibility for damages."

As has been seen, the appellants need not have confined this statement of theirs to power companies and power lines. The condition, as has been observed, extends to all applicants and to all their electric lines. Can it as so construed be justified as one of the "terms and conditions" by which the acceptance of a particular application may be accompanied? Upon this their Lordships would say at once that the dispensing power reserved to the Commissioners by cl. 3 of the General Order already quoted, so that the condition may or may not be made applicable in any particular case, enables them to treat it as a "term" or "condition" within the meaning of the section. As such then is it legal?

1934 A.C. p. 564.

Now the words "terms and conditions" are in constant use throughout the Act. In some instances, as, e.g., ss. 39, 202, 256, sub-s. 3 *(a)*, they are qualified by words of explanation or limitation. Here they are quite general. In such a case their true construction must be arrived at by reference to the principles thus enunciated by Romer L.J. in *West Midlands Joint Electricity Authority* v. *Pitt* (1), where he says: "But there are an almost infinite variety of terms and conditions, and the question whether or not these words include in any particular case some particular kind of term or condition must depend upon the context in which they are used." Similarly by Lord Macmillan when delivering the judgment of the Board in *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2) he says: "where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision."

Now, in their Lordships' judgment the powers of the Commissioners under this section are, at least primarily, purely administrative. As already observed, it is not without significance that in the section—differing from, for example, s. 151 and s. 373, sub-s. 4, of the Act—the Commissioners

(1) [1932] 2 K.B. 1, 55, 56. (2) [1930] A.C. 686, 697.

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are not in set terms given power to refuse applications made to them: the works they are empowered to authorize are from their nature as necessary in the interests of the public as is the working of the railways themselves, and the implication of the section appears, not obscurely, to be that if by the imposition of appropriate terms and conditions in regard to the execution of the works such ends as the safety of persons using or being upon the railway and the convenience of its working can be secured or safeguarded, then the works are to be authorized. All the specific provisions of the section are in accord with this view of it. These show it to be a construction section. Every applicant is to submit a plan of the location showing the proposed works: the Commissioners by their order are to prescribe the extent to which these works may be executed, by whom, when, and under whose supervision; while, most significant, perhaps, of all in its relation to the present question, is the enactment of sub-s. 4 that after the Commissioners' order is made the works may be constructed and maintained subject to and in accordance therewith. Is there or is there not an implication that so constructed and maintained, the rights and obligations of all parties in relation to these works are left to be regulated by the ordinary law?

1935 A.C. p. 565.

And more general considerations are not without their bearing on the proper answer. It is no doubt true that the Parliament of Canada, for the purpose of securing effective railway administration, may encroach upon the Provincial legislative domain in respect of property and civil rights. Nowhere is this more clearly enunciated than in the case of *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1) But a reference to the Railway Act shows how sparingly this power has there been exercised by that Parliament, while no instance of a delegation of this legislative power to the Commissioners, a purely administrative body, has been shown nearer than s. 34, sub-s. 3, if indeed that be such an instance. To discover this delegated power disguised in the authority given to the Commissioners to impose the terms and conditions referred to in this section is as matter of construction a difficult quest. Nor is such a delegation readily to be presumed from the nature of the case. The particular section of a wire or cable to which the Commissioners' authority is limited is in most cases a mere fraction of its

(1) [1908] A.C. 54, 58.

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1934 A.C. p. 566.

entire length even when carried along a railway; it is probably always so when carried across. Moreover, there are or may be in immediate juxtaposition to the wire or cable in question other similar wires or cables to which the Commissioners' terms and conditions have no application—the cables and wires of the railway company itself, for example. It is perhaps not an easy presumption that the Commissioners are by these indecisive words empowered to innovate upon the common law with reference to the fractions of wires or cables authorized by them and constructed and maintained in accordance with their order, leaving to be governed by that common law simpliciter, these very wires and cables throughout the rest of their course and even as they pass along and across the railways those other wires and cables over which they have no power.

In this connection the consideration of another section of the Railway Act, analogous in its provisions to s. 372, and referred to in the minority judgment of the Supreme Court is not irrelevant. By s. 273 the Commissioners may, upon the application of any landowner, order the railway company to provide and construct a suitable farm crossing across the railway wherever in any case the Board deems it necessary for the proper enjoyment of his lands, and the Board may order and direct—the words are in substance identical with those of s. 372—"how, when, where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained." Rinfret J. in his judgment, concurred in by Cannon J., asks with force whether it could be suggested that by these expressions Parliament intended to empower the Board to impose conditions of civil liability upon the farmer as a result of using the farm crossing. The negative answer is in the case of that section reinforced by the fact that Parliament itself in specific terms, and not by delegation, prescribed the extent of that civil liability: see s. 386. In the case of the cables and wires referred to in s. 372, Parliament apparently considered that no special enactment as to liability was necessary.

As already suggested, one instance of delegated authority may possibly be found in s. 34. If it be one, it is useful to note the terms in which it is conferred and the qualification to which it is subject. "Sect. 34 (3.).—The Board may by regulation or order provide penalties when not already

provided in this Act to which every company or person who offends against any regulation or order made by the Board shall be liable. (4.) The imposition of any such penalty shall not lessen or affect any other liability which any other company or person may have incurred."

Their Lordships have dealt at length with the construction placed on the condition by the appellants, because much of the argument was directed to the matters which have so far been alluded to. But it is not necessary for them to determine in this case whether if the amended condition had to be construed as the appellants seek to construe it, it would be one beyond the Commissioners' powers. It is enough for their Lordships to say that in their judgment the construction placed upon the condition by the appellants is not its true construction: its true effect raises different questions altogether, and it is upon them that the decision of the Board must depend.

Condition 2 does not, they think, impose upon applicants, as is contended by the appellants, a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the authorized works. The condition imposes no liability to the outer world at all. It is a clause of indemnity to the railway company only against any loss or damage that company may sustain and against any expense to which it may be put in meeting any claim against it by third parties by reason of the existence of the authorized works, such claim being maintainable against the company by the general law. The question is whether a condition, so construed, for such their Lordships think is its true construction, is within the competence of the Commissioners.

It having been strongly contended during the attack on the condition that the expression "terms and conditions" in s. 372 does not extend to conditions pecuniary or compensatory in character, it was thrown out by one of their Lordships in the course of the argument that that difficulty might possibly be met, if there were read into s. 372, s. 39 of the Act, where "terms and conditions" are actually so described. And the suggestion was taken up by counsel on both sides.

The section is as follows: "39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, reconstructed,

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1934 A.C. p. 568.

altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision the same shall be provided, constructed, reconstructed, altered, installed operated, used and maintained. 2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order shall be paid."

Their Lordships are struck by the possibility of reading the two sections together— that is to say, treating s. 39 as supplementary to s. 372. But not being, as they find, required to take that course in order to reach the conclusion at which, on the whole case, they have arrived they refrain on the present occasion from expressing any opinion upon the question whether it is open to them. Two compelling reasons actuate them in their reserve.

First of all, s. 39 has not been relied upon or even referred to in the proceedings as in any way affecting the present question, either by the Commissioners or by the majority of the Supreme Court or even by the respondents. On the contrary, both by the Commissioners and by Duff J. in his judgment, s. 372 is treated as the only section of the Railway Act in which the relevant powers of the Commissioners are to be found, and the one reference to s. 39 is made by Rinfret J. in his dissenting judgment in the Supreme Court, where treating the section as clearly having no application to cases under s. 372 he relies upon the difference in the phraseology of the two as a justification for his view that the result which might follow where, as in s. 39, the relevant words are "terms and conditions as to payment of compensation or otherwise" does not follow in cases under s. 372, where the words "terms and conditions" are used alone. But further, the question of the relation of s. 39 to other sections of the Act—to s. 272 already referred to, for example—raises considerations of wide importance as well as of difficulty upon which their Lordships would, unless so compelled, hesitate to pronounce

1934 A.C. p. 569.

until after these topics had been raised and fully considered in the Canadian Courts. Except with such assistance they would, for example, hesitate to express any opinion upon the question arising under this very s. 372—namely, whether by the inclusion in that section of so many of the provisions of s. 39 with variations appropriate, as may be suggested, to the particular subject being dealt with, the legislature has not "otherwise expressly provided" for these matters so as to exclude with reference to them the application altogether of s. 39.

But, their Lordships, without any reference to s. 39, have reached the conclusion that treating the amended condition as a term or condition within the meaning of s. 372, alone it is not beyond the powers of the Commissioners. The condition, as they read it, amounts to no more than this, that it is to be a term of permission granted to an applicant to carry his wires and cables along or across a railway that he shall save the railway company harmless from their presence there. It is a provision which their Lordships think would in a serious case quite naturally be embodied in a contract between the two parties where the works resulted from agreement between them, and they see no sufficient reason why, within their powers under the section, the burden should not, where the Commissioners think fit, be imposed by them upon a successful applicant. Its propriety in any particular case is a question for them. It is with its legality when imposed that their Lordships are alone concerned; and when construed as they have construed it, their Lordships think that to the legality of the condition no effective objection is forthcoming.

In the result, therefore, their Lordships are in accord with the answer returned by the Supreme Court to the question propounded for its consideration. They will accordingly humbly advise His Majesty that this appeal be dismissed. There will be no order as to its costs.

1934 A.C. p. 570.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden.*

J.C.* 1936 Dec. 17.

[PRIVY COUNCIL.]

FORBES.....APPELLANT;

AND

ATTORNEY-GENERAL FOR MANITOBA.....} RESPONDENT.

1937 A.C. p. 260.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Manitoba—Special income tax—Imposed by Provincial Act—Two per cent. on wages—Liability of Dominion civil servant living and working in the Province—Direct taxation—Employer and employee—No conflict between Dominion and Provincial taxation legislation—Provincial Act valid—British North America Act, 1867 (30 Vict. c. 3), s. 91 (3), (8); s. 92 (2)—The Special Income Tax Act, 1933 (23 Geo. 5, c. 44 (Manitoba)), s. 2, sub-s. 1; s. 3, sub-s. 1; s. 4, sub-ss. 1, 2, 3; s. 5, sub-ss. 1, 2; s. 6, sub-ss. 1, 2; s. 7.

The appellant, a Dominion civil servant employed as a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture, was resident within the Province of Manitoba and performed his official duties there:

Held, that the Special Income Tax Act, 1933, of Manitoba which (inter alia) imposes a tax of two per cent. on the wages of every employee in the Province, is valid Provincial legislation, and a Dominion civil servant resident in and working in the Province is taxable thereunder equally with all other employees in the Province.

The tax is a direct tax on employees in respect of that portion of their income which consists of wages, and the legislation is therefore valid under head 2 of s. 92 of the British North America Act, 1867, which enumerates "direct taxation within the Province in order to the raising of a revenue for Provincial purposes" as within the exclusive powers of Provincial Legislatures.

Dictum of Viscount Cave L.C. on "direct taxation" in *City of Halifax* v. *Fairbanks' Estate* [1928] A.C. 117, p. 125, and dictum of Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, p. 584—"Any person found within the Province may legally be taxed there if taxed directly"—applied.

Abbott v. *City of St. John* (1980) 40 Can. S.C.R. 597; and *Caron* v. *The King* [1924] A.C. 999, referred to.

The appellant was an "employee" within the meaning of s. 2, sub-s. 1 *(b)* and *(d)*, of the Act of 1933, and the Dominion Government was his "employer" within the meaning of s. 7 of the Act, which provides that in the case of wages paid without deduction of the tax "by his employer" the employee shall forthwith pay the tax. That provision does not impose any duty on any employer outside the Province, and the comprehensive meaning of the term "employer" is free to operate. It is not ultra vires of the Provincial Legislature to provide that if a wage-earner within the Province receives his wages from an employer outside the Province without deduction of tax, the wage-earner shall himself pay the tax, whether the outside employer is the Dominion Government or any one else.

1937 A.C. p. 261.

* *Present:*—LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

The provisions of ss. 4, 5 and 6 of the Act, however, by which the duties of deduction, of accounting, of making returns and of keeping records are imposed upon "every employer" under penalties, do not apply to the Dominion Government.

Lastly, there is here no conflict between the Dominion and Provincial income tax legislation. Both income taxes may co-exist and be enforced without clashing, and there is therefore no room for the application of the doctrine of the "occupied field," which only applies where there is a clash between Dominion and Provincial legislation within an area common to both.

Citizens Insurance Company of Canada v. *Parsons* (1881) 7 App. Cas. 96, 108, referred to.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 40, affirmed.

APPEAL (No. 92 of 1936), by special leave, from a judgment of the Supreme Court of Canada (January 15, 1936) affirming a judgment of the Court of Appeal of the Province of Manitoba (November 12, 1934), which judgment in turn affirmed the judgment of the County Court of Winnipeg (June 8, 1934).

The appellant, James Forbes, a Dominion civil servant employed as a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture, was throughout the material period resident within the Province of Manitoba and performed his official duties there. His remuneration was at the rate of $115.25 per month, plus five per cent. added and retained as a contribution to a superannuation fund. The Attorney-General for Manitoba, the respondent, suing on behalf of His Majesty in right of the Province, instituted an action in the County Court of Winnipeg to recover from the appellant a sum of $20.80, claiming that sum as a tax of two per cent. on the appellant's wages between May 1 and December 31, 1933, alleged to be due by him under the Special Income Tax Act, 1933 (23 Geo. 5, c. 44 (Manitoba)). The appellant had received his salary without deduction of the tax. By s. 3 of the Special Income Tax Act, 1933: "3. (1.) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part . . . ."

1937 A.C. p. 262.

The further relevant provisions of the Act appear from the judgment of the Judicial Committee.

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The County Court of Winnipeg gave judgment for the plaintiff. That decision was unanimously affirmed by the Court of Appeal of Manitoba (Prendergast C.J.M., Dennistoun, Trueman, Robson and Richards JJ.A.), whose judgment was in turn affirmed by the Supreme Court of Canada (Duff C.J., Lamont and Davis JJ.; Cannon and Crocket JJ. dissenting).

The appeal is reported at [1936] Can. S.C.R. 40.

The main point in this appeal was whether or not it was within the competence of a Provincial Legislature in the Dominion of Canada to impose the tax in question under the Special Income Tax Act upon a Dominion civil servant in the Province.

1936. Dec. 3, 4. *C. E. Finkelstein* for the appellant. There are four points raised by this appeal: (1.) Whether this statute imposes direct or indirect taxation; (2.) whether the Provincial Legislature can tax a Dominion civil servant's salary—that is, a tax on salary as salary; (3.) whether under the interpretation of the statute the "employer" in the Act includes the Crown in right of the Dominion, and "employee" includes a Dominion civil servant; and (4.) whether, in view of the fact that the Dominion Parliament has previously enacted income tax legislation, the Provinces can cover the same field and enact similar legislation. There are between 2000 and 2500 Dominion civil servants in Manitoba.

On the question whether this is direct or indirect taxation, if it is indirect taxation it will be invalid, because the Province cannot enact indirect taxation: s. 92, head 2, of the British North America Act, 1867. The Province can only enact direct taxation, and if this is indirect that would dispose of the entire case, not only so far as Dominion civil servants are concerned, but so far as all wage-earners in the Province are concerned. This is not what is called an income tax Act, it is a specific tax on wages. Taxing the wage-earner on the wage he receives amounts to taxing him on his gross income: it is an odd form of taxation. If all the Provinces should tax the civil servants' salaries there is no degree to which they might not go. This is a tax, if the Act is read in its proper light, placed on the employer: he is the person who must pay it, no matter what the wording used: see s. 4 and *Provincial Treasurer*

1937 A.C. p. 263.

of Alberta v. *Kerr*. (1) The employer is made liable in an indirect way, and therefore it is indirect taxation, and invalid. The employer is liable to heavy penalties if he does not make the deduction and pay the tax. It is really taxation on the employer with the right to recoupment from the employee: *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2); *Burland* v. *The King* (3); and *Cotton* v. *The King*. (4)

Next, there is no right in the Provincial Legislature to tax the salary as salary, and included in that is the argument that the attempted interception of the monies in the hands of the Dominion is bad. This is a tax specifically on salary, which is prohibited by s. 91, head 8, of the British North America Act. Under that head the Dominion Parliament has exclusive jurisdiction to fix the salaries of its civil servants. The Manitoba Act of 1933 enacts that the Dominion must deduct the tax and pay it over to the Province. That is beyond the power of the Provincial Legislature: it cannot order the Dominion Government to do so. The tax is a diminution of the salary. The Act orders the Dominion Government or its servant to pay to the Crown in right of the Province a portion of the salary: it cannot do that.

With regard to the question whether "employer" and "employee" includes the Dominion Government and a Dominion civil servant, it is only in cases where an employee has received these monies from an employer within the meaning of the Act that he is liable to pay. The Crown in right of the Dominion is not defined under the Act as an employer. In ss. 4, 5 and 6 of the Act the word "employer" cannot possibly mean the Crown in right of the Dominion: if it does not, can it be said that it does mean the Dominion Parliament when s. 7 is reached? All those sections, ss. 3, 4, 5, 6 and 7, must be read together. Since the appellant did not receive payment from an "employer" he is not liable. [Reference was made to *Hamilton* v. *The King*. (5)] 1937 A.C. p. 264.

On the point of overlapping legislation, the Provincial Legislature could not enact any form of income tax legislation in view of the fact that the Dominion had previously

(1) [1933] A.C. 710, 719, 722.
(2) [1925] A.C. 561.
(3) [1922] 1 A.C. 215.
(4) [1914] A.C. 176.
(5) (1916) 54 Can. S.C.R. 331, 357.

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drawn income tax within the domain of Dominion legislation in 1917. The Dominion having passed such legislation, any subsequent legislation passed by the Province dealing with income taxes is invalid. The question of overlapping legislation first came before this Board in *Tennant* v. *Union Bank of Canada*. (1) [Reference was also made to *Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada* (2); *In re Silver Brothers, Ld.* (3); *Citizens Insurance Company of Canada* v. *Parsons* (4); and *Caron* v. *The King*. (5)] Both Parts of the Act should be read as they stand, and should be construed strictly in the appellant's favour: *Munro* v. *Commissioner of Stamp Duties*. (6)

Isaac Pitblado K.C. and *W. E. McLean* for the respondent were not called upon.

Dec. 17. The judgment of their Lordships was delivered by

LORD MACMILLAN. The Attorney-General of the Province of Manitoba, suing on behalf of His Majesty in right of the Province, seeks in these proceedings to obtain judgment against the appellant for a sum of $20.80, being tax alleged to be due by him under the Special Income Tax Act, 1933, of the Province of Manitoba.

The appellant is a civil servant of the Dominion of Canada, and holds the office of a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture. Throughout the material period he was resident within the Province of Manitoba and performed his official duties there. His remuneration was at the rate of $115.25 per month, plus 5 per cent. added and retained as a contribution to a superannuation fund. Payment was made to him monthly by an order on the Receiver-General of Canada at Ottawa transmitted to him from Ottawa and cashed by him in Manitoba. The sum sued for is stated to represent a tax of two per cent. on the remuneration so received by the appellant during the period from May 1 to December 31, 1933. The appellant received his salary without any deduction of tax.

1937 A.C. p. 265.

The action was initiated in the county court of Winnipeg, where judgment was given against the appellant. The

(1) [1894] A.C. 31.
(2) [1907] A.C. 65, 68.
(3) [1932] A.C. 514, 520.
(4) 7 App. Cas. 96, 108.
(5) [1924] A.C. 999.
(6) [1934] A.C. 61, 68.

decision of the county court judge was unanimously affirmed by Court of Appeal of the Province of Manitoba, whose judgment in turn was upheld by a majority of the Supreme Court of Canada (Duff C.J., Lamont and Davis JJ.; Cannon and Crocket JJ. dissenting).

The grounds of defence on which the appellant relied before their Lordships were, broadly stated, that the Special Income Tax Act of 1933, so far as purporting to tax wages, and in particular the wages or salaries of Dominion civil servants, was unconstitutional and ultra vires of the Provincial Legislature, and that the statute was in any event inapplicable to the appellant as a civil servant of the Dominion of Canada. In order to deal with the arguments submitted on behalf of the appellant it is necessary to set out at length the material provisions of the enactment in question. The statute is entitled "An Act to Impose a Special Tax on Incomes." It contains two main parts, the first of which is headed "Taxation of Wages" and the second "Taxation of Income other than Wages." The following quotations are from Part I., on which the action is based:—

"3.—(1.) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part . . . .

1937 A.C. p. 266.

[Here follow certain exemptions inapplicable to the present case.]

* * * * * * * *

"4.—(1.) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the 15th day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any

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right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

"(2.) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

"(3.) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

"5.—(1.) Every employer shall keep at some place in the province, of the location of which he shall inform the administrator when requested to do so, a true and correct record of the names and residential addresses of all his employees, and of the dates upon which each of them worked, the wages paid to each, and such other matters as the administrator requires.

1937 A.C. p. 267.

"(2.) Every employer shall, on request of the administrator or any person authorised by him in writing, produce for inspection all records kept by the employer relating to his employees.

"6.—(1.) If an employer, in violation of the provisions of this part fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty ten per cent. of the tax payable, and he shall in addition be liable to a fine of 10 dollars for each day of default, but not to more than 200 dollars.

"(2.) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding 500 dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for th

recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

"7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax, and all the provisions of sections 23, 23A, 24 and 25 of 'The Income Tax Act' shall, mutatis mutandis, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them."

Sect. 2, sub-s. 1, of the Act provides the following interpretations:—

"*(b)* 'Employee' means any person who is in receipt of or entitled to any wages;

"*(c)* 'Employer' includes every person, manager, or representative having control or direction of or responsible, directly or indirectly, for the wages of any employee, and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer;

"*(d)* 'Wages' includes all wages, salaries, and emoluments from any source whatsoever, including—

"(i.) any compensation for labour or services, measured by time, piece, or otherwise; 1937 A.C. p. 268.

"(ii.) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial Court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

* * * * * * * *

Taking the contentions of the appellant in the order in which they were advanced, their Lordships deal first with his submission that the tax on wages which the Act imposes is not "direct taxation within the province in order to the raising of a revenue for provincial purposes" within

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the meaning of s. 92 (2) of the British North America Act, 1867, and is consequently invalid. This argument, it will be observed, would, if sustained, invalidate the tax as regards all wage-earners in Manitoba and not merely in the case of Dominion civil servants. While in the heading of this Part of the Act the tax is described as a "Tax on Wages" it would be more accurate to describe it as a tax on employees in respect of, or measured by, their wages, and indeed it is described in s. 4 as "the tax imposed on the employee by this part."

Now, all are agreed that an income tax is the most typical form of direct taxation. "The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation": per Viscount Cave L.C., in *City of Halifax* v. *Fairbanks' Estate*. (1) If, then, the tax in question is an income tax, there is an end of the matter. Prima facie the tax is an income tax. The statute imposing it is entitled "An Act to Impose a Special Tax on Incomes." It invokes the aid of provisions of the Manitoba Income Tax Act (1924 C.A., c. 91 and amending Acts), and in s. 16 the Lieutenant-Governor in Council is empowered to make regulations for the joint administration of the Act and the Manitoba Income Tax Act. The Act as a whole covers all taxable income, Part I. dealing with one form of income, namely, income from wages, and Part II. dealing with income other than wages. Wages are undeniably income, and the tax is by s. 2 imposed on employees in respect of the wages earned by them. A tax is not the less a tax on income because it is imposed on a particular component of the taxpayers' income. It may be convenient to tax one part of the taxpayers' income in one way, another part in another way. Moreover, the tax is not in any way discriminatory, for it is imposed on all wage-earners indiscriminately.

1937 A.C. p. 269.

To all this the appellant answers that while the statute may profess to charge the tax on the wage-earner in respect of his wages, it enacts that it is to "be levied and collected . . . . in the manner prescribed by this part," and the manner prescribed is that the employer is to deduct the amount of the tax from the wages which he pays to

(1) [1928] A.C. 117, 125.

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his employees and account for it to the Crown. The tax, he says, is thus really imposed on the employer; it is not a tax on any income which the employee receives, but a tax on the wage fund in the hands of the employer, and the tax is thus only indirectly imposed on the employee. Their Lordships cannot accept this argument. In their view s. 3 is what it professes to be, a section charging the tax on the employee. The following sections which provide for the deduction of the amount of the tax by the employer before he pays over his employee's wages are mere machinery, and machinery of a very familiar type in income tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A taxpayer is said either to pay or to bear income tax according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer and on him the burden of the tax is imposed. In their Lordships' opinion the present tax is a direct tax on employees in respect of that portion of their income which consists of wages.

1937 A.C. p. 270.

The appellant's second contention was that it is incompetent for the Provincial Legislature to tax the income of a Dominion civil servant? Why so? "Any person found within the province may legally be taxed there if taxed directly": per Lord Hobhouse in *Bank of Toronto* v. *Lambe*. (1) The appellant's argument is that the tax offends against the exclusive legislative authority of the Dominion Parliament in "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada" under s. 91 (8) of the British North America Act. If, he says, the Provincial authorities can tax at the rate of two per cent. the salary which he receives from the Dominion to enable him to live in the Province and discharge his duties there, they can tax his salary to such an extent as to render it impossible for him to live and perform his duties. A similar argument in terrorem was advanced and rejected in the case of the *Bank of Toronto* v. *Lambe* (2): "It is suggested," says Lord Hobhouse, "that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships

(1) 12 App. Cas. 575, 584. (2) Ibid. 586.

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cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes."

The validity of imposing direct taxation by provincial legislation on a Dominion official has been expressly established by authority in the case of *Abbott* v. *City of St. John* (1), which was approved by this Board in *Caron* v. *The King*. (2) Lord Phillimore, in delivering the judgment of the Board, quoted this passage from the judgment of Davies J. in *Abbott's* case (3): "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents." Dealing with the suggestion that provincial taxation might paralyse the Dominion civil service, Davies J. adds that (4) "if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power." It should, perhaps, be explained that in *Caron's* case (2) the validity of the Dominion Income War Tax Act, 1917, as affecting the salary of a minister of a Provincial Government, was upheld. The present case is the converse. In their Lordships' opinion the appellant's second contention must share the fate of the first.

1937 A.C. p. 271.

Next, the appellant submits that he is not an "employee" at all within the meaning of the Act, and, further, that the Dominion is not his employer. Cannon J., in the distressing picture which he draws of the civil servant's lot, seems to share this view. It is not, however, the view of the Dominion Legislature, which in the Civil Service Act, 1927, R.S.C. c. 22, uses the word "employees" in speaking of civil servants, and indeed in s. 2 interprets "employees" to mean and include "officers, clerks and employees in the civil service." But the Act is quite explicit, and the

(1) (1908) 40 Can. S.C.R. 597.
(2) [1924] A.C. 999.
(3) Ibid. 1005. (A.C.)
(4) [1924] A.C. 1005.

appellant clearly falls within the definition of "employee" in s. 2, sub-s. 1 (*b*), for he "is in receipt of . . . . wages" and "wages" by s. 2, sub-s. 1 (*d*), include "all wages, salaries, and emoluments from any source whatsoever," and in particular "(ii.) the salaries . . . . of all persons whatsoever, whether such salaries . . . . are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person." To this there can really be no answer. The appellant, however, seeks to extricate himself by arguing that even if he is an employee, the Dominion Government is not his employer within the meaning of the Act. If the Dominion is his employer the combined effect of s. 3 of the Act imposing the tax on him as an employee and s. 7 requiring him "to forthwith pay the tax" if his wages are paid to him "without the tax imposed thereon being deducted therefrom by his employer"—which is the case with the appellant—leads inevitably to judgment against him. If the Dominion is not his employer, then he maintains that the condition of the tax not having been deducted by his employer has not been fulfilled, and he escapes from the conditional obligation to pay imposed by s. 7.

1937 A.C. p. 272.

In support of the submission that the Dominion is not an "employer" within the meaning of the Act, the appellant refers to ss. 4, 5 and 6 of the Act, where the duties of deduction, of accounting, of making returns and of keeping records are imposed upon "every employer" under penalties. This cannot, he says, apply to the Dominion, for it would be ultra vires of the Provincial Legislature to impose duties and corresponding penalties on the Dominion Government; if the Provincial Legislature has done so, the legislation is invalid. Their Lordships agree that in these sections the term "employer" does not on a sound construction apply to the Dominion Government. But equally it does not apply to all other employers outside the Province. And this for the very good reason that the revenue laws of a country are addressed to the inhabitants of that country and are ineffectual to reach or affect persons beyond its borders. Indeed, "it may be accepted as a general principle that States can legislate effectively only for their own territories": *Croft* v. *Dunphy*. (1) Therefore, when a revenue statute of Manitoba addresses "every

(1) [1933] A.C. 156, 162.

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employer" and requires him under penalties to discharge certain duties in relation to the collection of the revenue of the Province, the order must be construed as addressed to "every employer" who is subject to the Legislature, and is inapplicable to employers beyond its jurisdiction, notwithstanding that the language in which the term "employer" is defined in the Act is sufficiently wide to include persons beyond its jurisdiction. On the other hand, their Lordships are equally clear that there is no such obstacle in the way of construing the word "employer" where it occurs in s. 7 in the phrase "without the tax imposed thereon being deducted therefrom by his employer" as including the Dominion Government or any other employer outside Manitoba. The comprehensive meaning of the term "employer" is here free to operate, for the provision in question does not seek to impose any duty on persons outside the Province; it merely refers to a question of fact, the fact of the employer, wherever or whoever he may be, not having deducted the tax in paying wages to a person within the Province. It is not ultra vires of the Provincial Legislature to provide that if a wage-earner within the Province receives his wages from an employer outside the Province without deduction of tax, the wage-earner shall himself pay the tax, whether the outside employer be the Dominion Government or any one else. Such legislation is not legislation affecting persons outside the Province with any duty or liability.

1937 A.C. p. 273.

The last ground on which the appellant took his stand is even less tenable. He submitted that the Dominion Parliament by enacting a general Dominion Income Tax in 1917 had already so occupied the field of this form of taxation as to preclude the Manitoba Legislature from enacting any income tax legislation. In their Lordships' opinion this submission, which, if well-founded, would invalidate the whole Act and not merely Part I., is based on a misconception of the doctrine of the "occupied field" evolved in the interpretation of the British North America Act. The Dominion Parliament has exclusive authority under s. 91 (3) to make laws for "the raising of money by any mode or system of taxation," and each Province under s. 92 (2) has the exclusive right to make laws for "direct taxation within the Province in order to the raising of a revenue for provincial purposes." It was pointed out in *Citizens*

Insurance Company of Canada v. *Parsons* (1) that though the description "the raising of money by any mode or system of taxation" is "sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' assigned to the provincial legislatures by s. 92, it obviously could not have been intended that . . . . the general power should override the particular one." (2) This statement is quoted and approved in *Bank of Toronto* v. *Lambe*. (3) The doctrine of the "occupied field" applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here there is no conflict. Both income taxes may co-exist and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The Province reaps another part of it. This argument therefore also fails.

Their Lordships have now disposed adversely to the appellant of all the grounds on which the validity of the tax in question was challenged before them, and they will accordingly humbly advise His Majesty that the appeal be dismissed. As their Lordships were informed that it had been agreed between the parties that they should each bear their own costs throughout these proceedings there will be no order as to costs.

Solicitors for appellant: *Herbert Smith & Co.*

Solicitors for respondent: *Blake & Redden.*

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(1) 7 App. Cas. 96. (2) 7 App. Cas. 108.
(3) 12 App. Cas. 575, 585.

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Judicial Committee of the Privy Council.
(Lord Blanesburgh, Lord Atkin, Lord Maugham, Lord Roche, and Sir Sidney Rowlatt.)

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THE JUDGES

v.

ATTORNEY-GENERAL FOR SASKATCHEWAN.*

Canada—Saskatchewan—Judges' salaries and allowances—Subject to Provincial income-tax—Judicial emoluments not the subject of special exemption—British North America Act, 1867 (30 and 31 Vict., c. 3), ss. 92, 96, 99, 100—Judges Act, R.S.C., 1927, c. 105, s. 21—Income Tax Act, 1932, of Saskatchewan, c. 9, ss. 2 (8), 3 (c) (d), 7 (a) (b) (c) (d) and (e).

The Judges of the Court of Appeal, the Court of King's Bench, and the District Courts of the Province of Saskatchewan are subject to the taxation authorized by the Income Tax Act, 1932, of Saskatchewan, and their salary and allowances, paid pursuant to the Judges Act, R.S.C., 1927, must accordingly be included in their income for the purpose of the Income Tax Act, 1932.

Forbes v. *Attorney-General for Manitoba* (53 *The Times* L.R. 211; [1937] A.C. 260) followed and applied.

Judicial emoluments are not protected by any paramount principle making inapplicable to such income a tax imposed by a statute in terms wide enough to include it. Neither the independence nor any other attribute of the judiciary could be affected by a general income-tax which charged their official incomes on the same footing as the incomes of other citizens.

Cooper v. *Commissioners of Income Tax for the State of Queensland* ([1907] 4 C.L.R. 1304), and *Krause* v. *Commissioner for Inland Revenue* ([1929] S.A.R. (A.D.) 286) approved.

Judgment of the Court of Appeal for Saskatchewan affirmed.

This was an appeal from a judgment of the Court of Appeal for Saskatchewan, dated June 6, 1936, holding that the Judges of the Court of Appeal, the Court of King's Bench, and the District Courts of the Province of Saskatchewan were liable for the payment of income-tax on their judicial emoluments under the Income Tax Act, 1932, of Saskatchewan.

The two questions referred to the Court of Appeal by the Lieutenant-Governor in Council, and the relevant statutory provisions, are set out in the judgment of the Judicial Committee.

* Reported by Charles Clayton, Esq., Barrister-at-Law.

Mr. Frank Gahan appeared for the appellants, the Judges; and Mr. Wilfrid Barton for the respondent; Mr. Theobald Mathew held a watching brief on behalf of the Attorney-General for Canada.

SIR SIDNEY ROWLATT, in delivering the judgment of the Board, said: This is an appeal from a judgment of the Court of Appeal for Saskatchewan, dated June 6, 1936, answering in the affirmative certain questions referred to the Court by the Lieutenant-Governor in Council for hearing and consideration pursuant to the Constitutional Questions Act, chapter 60 of the Revised Statutes of Saskatchewan, 1930.

The questions so referred were: "(1) Are Judges (*a*) of the Court of Appeal, (*b*) of the Court of King's Bench, (*c*) of the District Courts, of the Province of Saskatchewan, appointed by His Excellency the Governor-General, pursuant to section 96 of the British North America Act, 1867, subject to the taxation authorized by the Income Tax Act, 1932, of Saskatchewan, being otherwise persons subject to the provisions of the said Act? (2) If the said Judges or any of them are subject to the said taxation, then has the Legislature of Saskatchewan legislative authority to include in income for the purposes of the Income Tax Act the salary and allowances of the said Judges or any of them paid pursuant to the provisions of the Judges Act, being chapter 105 of the Revised Statutes of Canada, 1927?"

The reference in question placed the Court in an embarrassing position, all its members being from the nature of the case personally interested in the point in controversy. They took the view (quite rightly in their Lordships' opinion) that they were bound to act *ex necessitate*. In the result they came unanimously to a conclusion adverse to the contention put before them on behalf of their order.

The statutory provisions which it is necessary to consider are as follows: By section 92 of the British North America Act, 1867, one of the subjects assigned to Provincial Legislatures is "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." The other material sections of the same Act are:—Section 96: "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province except those of the Courts of Probate in Nova Scotia and

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New Brunswick." Section 99: "The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons." Section 100: "The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada."

Pursuant to the powers conferred by the last-mentioned section the Parliament of Canada has, at various times, passed statutes fixing and providing the salaries and allowances of the Judges of the several Provinces specifically. The enactment affecting this appeal is the Judges Act, R.S.C., 1927, c. 105, mentioned in the second question in the present reference. In addition to the salaries the Act provides, by section 21, for the payment to Judges of certain living and travelling expenses when acting away from their places of residence.

The Income Tax Act, 1932, of Saskatchewan, referred to in the questions for the Court, provides as follows:—

Section 2: "In this Act, unless the context otherwise requires, the expression

"(8) 'Person' means an individual, and includes a guardian, trustee, executor, administrator, agent, receiver or any other individual, firm or corporation acting in a fiduciary capacity, and the heirs, executors, administrators, successors and assigns of such person.

Section 3: "For the purposes of this Act, 'income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Saskatchewan or elsewhere; and includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and whethe

such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including:

"*(c)* the salaries, indemnities or other remuneration of all persons whatsoever, whether the said salaries, indemnities or remuneration are paid out of the revenue of his Majesty in respect of his Government of Canada, or of any Province thereof, or by any person, except as herein otherwise provided; and

"*(d)* all other gains or profits of any kind derived from any source within or without the Province whether received in money or its equivalent."

Section 7: "(1) There shall be assessed, levied, and paid upon the income during the preceding year of every person:

"*(a)* residing or ordinarily resident in Saskatchewan during such year; or

"*(b)* who remains in Saskatchewan during any year for a period or periods amounting to one hundred and eighty-three days;

"*(c)* who is employed in Saskatchewan during such year; or

"*(d)* who, not being resident in Saskatchewan, is carrying on business in Saskatchewan during such year; or

"*(e)* who, not being resident in Saskatchewan, derives income from services rendered in Saskatchewan during such year, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Saskatchewan;

"a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the First Schedule to this Act, upon the amount of income in excess of the exemptions granted by this Act; . . . ."

* * * * * * * *

No special provision is made for taxing or for exempting from taxation Judges' salaries or allowances. Certain allowances and deductions are to be made in ascertaining the taxable income. These deductions include, by section 5: "(1) *(f)* travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business."

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It is to be observed that no question arises in the reference which has given rise to this appeal as to the general validity of any provision of this Income Tax Act, the only point being whether the salaries and allowances of the Judges are exempt from its operation. Nor is it in question whether, or how far, assuming judicial emoluments to be validly taxed by the statute, the living and travelling allowances of the Judges should be included in the *quantum* of their assessments. It should be added that counsel for the appellants expressly disclaimed in argument any contention that the Judges were exempt from income tax save in respect of their official emoluments.

The judgment in the Court below answering both questions in the reference in the affirmative was delivered by Mr. Justice Martin. It was pointed out that the Judges of the Courts in question, being persons residing in Saskatchewan and in receipt of salaries, paid out of the revenues of the Dominion, were, *prima facie*, subject to taxation by the Province in respect of their incomes just as other residents, and that there was nothing in sections 96, 99, and 100 of the British North America Act, 1867, to limit the powers of the Provinces to tax their salaries. An argument had apparently been addressed to the Court based on the word "fixed" in section 100. The same word is used in section 91 (8) of the British North America Act in defining the powers of the Parliament of Canada with respect to the salaries of Civil servants, and the Court had before it two decisions of the Supreme Court of Canada—namely, *Abbott* v. *City of St. John* (40 Can. S.C.R. 597) and *Attorney-General for Manitoba* v. *Forbes* ([1934]) 3 W.W.R. 681)—in which a Provincial income-tax on such salaries was upheld. The latter of these two cases was appealed to his Majesty in Council (53 *The Times* L.R. 211; [1937] A.C. 260). The decision of the Supreme Court was affirmed, and the argument under discussion is therefore not now open.

This, in effect, disposes of the present case also, unless judicial emoluments are in a class apart, protected by some paramount principle making inapplicable to that form of income a tax imposed by statute in terms wide enough to include it. There is no foundation in the realities of the situation for any such conception. Neither the independence nor any other attribute of the judiciary can be affected by a general income-tax which charges their official incomes

on the same footing as the incomes of other citizens. The Court below, agreeing with, though not bound by, two decisions in other Dominions—namely, *Cooper* v. *Commissioner of Income Tax for the State of Queensland* ([1907] 4 C.L.R. 1,304), before the High Court of Australia, and *Krause* v. *Commissioner for Inland Revenue* ([1929] S.A.R. (A.D.) 286), in the Supreme Court of South Africa—found no reason for exempting judicial emoluments from income-tax. Their Lordships are of the same opinion.

They will therefore humbly advise his Majesty that the appeal be dismissed. Pursuant to an arrangement between the parties there will be no order as to costs.

[Solicitors—Messrs. Blake and Redden; Mr. J. M. Isaacs; Messrs. Charles Russell and Co.]

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Jan. 28.

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p. 326.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR CANADA ..... } Appellant;

AND

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS ..... } Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statutes—Constitutional validity—Legislation passed in performance of treaty obligations—Property and civil rights in the Province affected—Invalid legislation—Distribution of legislative powers—Based on classes of subjects—Principle unaffected by new international status of Canada—Totality of legislative power by co-operation with Provinces—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92 (13), 132—Weekly Rest in Industrial Undertakings Act, 1935, St. Can. (25 & 26 Geo. 5, c. 14)—Minimum Wages Act, 1935, St. Can. (25 & 26 Geo. 5, c. 44)—Limitation of Hours of Work Act, 1935, St. Can. (25 & 26 Geo. 5, c. 63).

The Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, of the Parliament of Canada, which in substance gave effect to draft conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, 1919, and ratified by the Dominion of Canada, were ultra vires of the Parliament of Canada and invalid in that the legislation related to matters coming within the class of subject "Property and civil rights in the Province" which was assigned exclusively to the Legislatures of the Provinces by head 13 of s. 92 of the British North America Act, 1867.

In re Legislative Jurisdiction over Hours of Labour [1925] Can. S.C.R. 505, referred to.

The legislation could not be justified under s. 132 of the British North America Act, which provided that the Parliament of Canada should have "all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries," because the obligations under the ratified conventions were not the obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international juristic person, and they did not therefore arise under a treaty between the British Empire and foreign countries.

In re The Regulation and Control of Radio Communication in Canada [1932] A.C. 304, applied.

1937 A.C. p. 327.

Jurisdiction to legislate for the purpose of performing the obligations of a Canadian treaty does not reside exclusively in the Parliament of Canada: *In re The Regulation and Control of Aeronautics in Canada* [1932] A.C. 54, and *In re The Regulation and Control of Radio Communication in Canada* [1932] A.C. 304, do not afford a warrant for the contrary view.

Present:—Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright M.R., and Sir Sidney Rowlatt.

For the purposes of the distribution of legislative powers between the Dominion and the Provinces under ss. 91 and 92 there is no such thing as treaty legislation as such. The distribution is based on classes of subjects, and as a treaty deals with a particular class of subject so would the legislative power of performing it be ascertained.

No further legislative competence was obtained by the Dominion from its accession to international status and the consequent increase in the scope of its executive functions. There was no existing constitutional ground for stretching the competence of the Dominion Parliament so that it became enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affected the classes of subjects enumerated in s. 92 legislation to support the new functions was within the competence of the Provincial Legislatures only; if they did not, the competence of the Dominion Legislature was declared by s. 91 and existed ab origine. The Dominion could not, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

Further, the present legislation was not concerned with matters of such general importance as to justify the overriding of the normal distinction of powers in ss. 91 and 92.

Dicta of Duff C.J. in *In re The Natural Products Marketing Act* [1936] Can. S.C.R. 398, at 414 et seq., approved and applied.

Lastly, in totality of legislative powers, Dominion and Provincial together, Canada was fully equipped to legislate in performance of treaty obligations, but the legislative powers remained distributed, and if in the exercise of her new functions derived from her new international status Canada incurred obligations, they must, so far as legislation was concerned, when they dealt with Provincial classes of subjects, be dealt with by the totality of powers—by co-operation between the Dominion and the Provinces.

APPEAL (No. 100 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering questions referred to the Court by Order of the Governor-General in Council, dated November 5, 1935. The questions referred asked whether the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, were ultra vires of the Parliament of Canada. The Statutes in question, which dealt with the matters denoted by their titles, were passed by the Dominion Parliament in accordance with conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. The conventions had been ratified by the Dominion.

1937 A.C. p. 328.

The facts, the relevant provisions of the Treaty of Versailles and of the British North America Act, 1867, appear from the judgment of the Judicial Committee.

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In the Supreme Court of Canada, Duff C.J., Davis and Kerwin JJ. were of opinion that, except as to s. 6 of the Minimum Wages Act, the three Statutes were intra vires. Rinfret, Cannon and Crocket JJ. were of opinion that the Acts were ultra vires. The judgments of the Supreme Court are reported at [1936] Can. S.C.R. 461.

1936. November 13, 16, 17, 19, 20 and 23. *R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The Statutes deal with the matters their titles indicate. Admittedly the matters dealt with by the Statutes would ordinarily come within head 13 of s. 92 of the British North America Act, and be matters of Provincial concern, and there must therefore be found some ground for taking them out. The Dominion rely on the fact that it was performing a duty under the Treaty of Versailles in compliance with the provisions of s. 132 of the British North America Act. The obligation to enact the legislation arose under the Treaty, and s. 132 applied. If that be not so, in any event the conventions were validly entered into and the obligation to perform them was an obligation of the Dominion of Canada which it could properly discharge by enacting the legislation in question, really making an application of *In re The Regulation and Control of Radio Communication in Canada.* (1) Reliance is also placed on the peace, order and good government aspect of the matter in the same way as it was relied on in the *Radio* case. (1) Against the Dominion, either in the Cases which have been filed or in the reasons in the judgments against the Dominion, the following questions arise: (1.) That the Dominion has no power to enter into such conventions with any foreign State; (2.) that Canada did not in fact ratify the conventions; and (3.) that s. 132 of the British North America Act has no application. It was further said that, even if Canada did validly ratify the conventions, the matters to which they related were matters on which the Provinces alone could legislate. [Reference was made to the preamble of the Weekly Rest in Industrial Undertakings Act, and to arts. 158, 405, 406 and 407 of the Treaty of Versailles.] Under art. 405, para. 5, a member having received a draft convention was to bring it before the authority within whose

1937 A.C. p. 329.

(1) [1932] A.C. 304.

competence "the matter" lay. It is submitted that that related to what was called ratification. "The matter" was the matter of ratification—there was no convention at that time. If it meant not ratification but performance, then was the authority within whose competence the matter lay the authority who might do the act or pass the legislation in performance of the convention in case it was ratified? Was that the competent authority, or does it mean the authority who would pass such legislation if there were no such convention at all? The Dominion says that it is the former, the Provinces say the latter. [Reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (1), and to the draft conventions to show the procedure that was followed, and to the reasons and occurrences which, it was alleged, accounted for the long delay on the part of Canada between the date of the drafting of the conventions at Geneva and their acceptance by Canada.]

It is submitted that *In re Legislative Jurisdiction Over Hours and Labour* (2) was wrongly decided. The *Radio* case (3) was the case of a convention, not of a treaty, and therefore s. 132 of the British North America Act did not apply. The performance of obligations under the conventions is not to depend on whether the subject-matter is one coming within the enumerated heads of s. 92. By the transference of the treaty-making power to the Dominion executive, and correlative power to legislate to carry out the obligations, nothing is taken from the Provinces.

1937 A.C. p. 330.

[LORD ATKIN. The Dominion has not got unlimited powers of legislation.]

The residuary clause of s. 91 of the British North America Act is capable of the construction, which is not inconsistent with decided cases, that where Canada has properly incurred an international obligation with respect to any matter whatsoever, that within whatever classes in ss. 91 and 92 it may be described as coming under other circumstances, once the matter has assumed the aspect of an international bargain it is no longer to be treated as belonging to any one of the enumerated classes.

(1) [1914] A.C. 237, 252. (2) [1925] Can. S.C.R. 505.
(3) [1932] A.C. 304, 311.

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[LORD ATKIN. That is a very far-reaching doctrine: it means that Canada could make an agreement with any State which would seriously affect Provincial rights.]

It is a power which cannot be exercised by Canada alone; some other country must be found which is willing to enter into a bargain. This matter must not be looked at as though Canada is going to look about the world to find some one with whom to make an agreement for the purpose of robbing the Provinces of their constitutional rights. But, logically, it must be admitted that whatever Canada and such other country agree to do can be effected by Canada. There are three propositions as to the power of the Dominion to enter into or to advise His Majesty in respect to the making of international obligations: (1.) An obligation arose directly from the Treaty of Versailles, and the conventions in question were entered into under that obligation, and s. 132 of the British North America Act therefore applies to the powers of the Dominion. (2.) Even if the matter cannot be put as high as a treaty obligation, at least under the Treaty of Versailles the necessary power was given to advise His Majesty in respect of such conventions. (3.) By the constitutional developments, particularly since the Treaty of Versailles, the constitutional right to advise His Majesty in respect of international obligations affecting Canada has become vested in his Canadian Ministers. That is sometimes expressed by saying that the right to exercise the prerogative in respect of Canadian affairs has been transferred to the Canadian executive. It is submitted that as to both the second and third of the above propositions the power of the Dominion to legislate in performance of the obligations arises either on a proper interpretation of s. 132 of the British North America Act or on the principles outlined in the *Radio* case. (1) The power to legislate must be obtained under one or other of those two heads.

1937 A.C. p. 331.

With regard to art. 405, para. 7, of the Treaty of Versailles, once consent was obtained from the Senate and the House of Commons in 1935, and it is submitted that consent was obtained, then there was no right to refuse to ratify—it was a treaty obligation on the executive Government of Canada to ratify.

(1) [1932] A.C. 304.

[LORD ATKIN. How did the consent without legislation of the Senate and the House of Commons become a matter which made them the competent authority?]

First, it is ordinary constitutional practice to ask the approval of the body which will, in the event of the engagement being entered into, have the power to enact the legislation. Secondly, it is the only competent authority to pass the legislation where a convention has been entered into: *Attorney-General of British Columbia* v. *Attorney-General of Canada.* (1) There has been a direct and unbroken chain of obligation existing under the Treaty of Versailles; there has been the agreement of the High Contracting Parties that all these things will be done, step by step, if conditions arising from time to time are fulfilled. Every condition here, it is submitted, has been fulfilled, and there has been consent by the legislative body which alone would have power to carry out the Treaty. The legislation could not be enacted by the Provinces afterwards. Even if the Board should be of opinion that at some point there is a missing link in the chain of obligation, it is submitted that the Treaty of Versailles, and particularly art. 405, definitely and expressly recognizes the power of Canada to enter into such obligations as a member of the League of Nations and as a member of the Labour Organization.

1937 A.C. p. 332.

With regard to the position after ratification, when s. 132 of the British North America Act speaks of obligations as part of the British Empire towards foreign countries, those words describing the international obligation should be given a broad meaning. "Empire" there ought to be read as "His Majesty." The performance of the obligations loses its aspect of being a private matter of the individual inhabitants of Canada and becomes one of nation-wide importance, and not one which is to be divided among the Provinces. The Statutes in question are, with the exception of s. 6 of the Minimum Wages Act, merely in compliance with a treaty obligation: that is all the Dominion professes to do; it has not claimed any broad jurisdiction in these matters as having been taken out of s. 92, but merely seeks to deal with them for this one special purpose. Upon a fair and proper construction of the residuary power it

(1) [1924] A.C. 203.

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should be deemed to extend to the performance of international obligations. A valid obligation was entered into, and the legislation in question was validly enacted to carry it out. [Reference was also made to Oppenheim's "International Law," 4th ed., 1928, vol. I., p. 194; Anson's "Law and Custom of the Constitution," 4th ed., 1935, vol. II., p. 87; Keith's "Constitutional Law of the British Dominions," 1st ed., 1933, pp. 99-100, and p. 394 et seq.; and to Noel Baker's "The Present Juridical Status of the British Dominions in International Law," 1929 ed., p. 197-8; and *In re Regulation and Control of Radio Communication.* (1)]

Plaxton K.C. followed. The Dominion Parliament has the capacity under the residuary power to give effect to a convention not within the purview of s. 132 of the British North America Act, and that was so held in the *Radio* decision. (2)

1937 A.C. p. 333.

A matter which may be local and Provincial in its nature may assume another aspect once the country becomes committed as a whole to some other country under a treaty. [Reference was made to *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (3); to Oppenheim's "International Law," 4th ed., vol. I., p. 716; and to Westlake's "International Law," 2nd ed., 1910, pt. I., p. 290, and to *Attorney-General of British Columbia* v. *Attorney-General of Canada.* (4)]

A. W. Roebuck K.C., *A.-G.* for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Sect. 132 of the British North America Act gives no treaty-making power to the Dominion Government, but it does confer on the Parliament authority to carry out the obligations of treaties validly made on behalf of both the Dominion and the Provinces. The argument so far presented leaves the Province as a mere municipal institution, a mere nonentity in Imperial and foreign relations. That was not the intention of the framers of the British North America Act; the Province has obligations to foreign countries. The power given by s. 132 is not an exclusive power; it may be an overriding power.

The authority competent to sign a treaty creating obligations is the King or some authority specially delegated to

(1) [1931] Can. S.C.R. 541, 545, 551.
(2) [1932] A.C. 304, 311, 313.
(3) [1923] A.C. 695, 704.
(4) [1924] A.C. 203.

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do so by the King. [Reference was made to *In re The Initiative and Referendum Act* (1), and to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*. (2)] There are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the Provinces have in some way come to be the Dominion Ministers. The Province has the right to advise the Crown in matters where its legislative powers apply. Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign State. So far as legislative and executive authority are concerned the Governor-General and the Lieutenant-Governors of the Provinces, and the Dominion Parliament and the Provincial Legislatures are equal in status. The Treaty of Versailles is binding on Ontario as part of the British Empire. It is not to be considered that those who drafted the Canadian constitution intended to write a constitution which was subject to defeat in its main provisions by competing jurisdictions. The concentration of power in the hands of the Dominion is fatal to Canada as it has been known in the past. The Statute of Westminster, 1931, does not change a word in the British North America Act. The only place in the Treaty of Versailles where there is a binding obligation that would qualify under s. 132 of the British North America Act is art. 405, para. 5. It is hard to find in the Treaty that the Dominion have anything to do beyond submitting to the competent authority. In any event, the words "authority or authorities" in that paragraph clearly contemplate the possibility of the legislation being carried out in alternative jurisdictions. And the words "within whose competence the matter lies" must mean within whose competence "to legislate" the matter lies: "the matter" is the subject-matter of the conventions, in this instance, the three Acts in question. The competence only went to the Dominion after the obligation confirming ratification became completed. On the strength of the dates and facts as to ratification, the ratification was not in accordance with the Treaty of Versailles, and no obligation rested on Canada or any of the Provinces which might be carried out under s. 132 of the British North America Act. It has been argued that ratification by Canada constituted an agreement in itself as between

1937 A.C. p. 334.

(1) [1919] A.C. 935, 941–2. (2) [1892] A.C. 437, 441.

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countries. From the form of the ratification it was not an agreement, but only amounted to an offer. It was not signed by the King, but by the Under-Secretary of State for External Affairs of Canada.

The subject-matter in the *Radio* case (1), and the *Aeronautics* case (2), was in each instance within s. 91 and not within s. 92 of the British North America Act, so that there is a complete distinction between those cases and the present one, except on one ground. If it were held that the present matters were of such national importance, of such wide import as to affect the body politic of the Dominion in the overriding way that was found in *Russell* v. *The Queen* (3), if they were taken out of the specific heads of s. 92, then Ontario is satisfied to see this legislation supported. With regard to the overriding features of this legislation, the Province of Ontario looks on the legislation as good, and believes that it is in the public interest; but they are unfortunate in being called upon to fight a bad principle in connection with a good measure. The Acts are of national importance, and the subject has attained such proportions as to affect the body politic.

J. B. McNair K.C., A.-G. for New Brunswick and *Frank Gahan* for the Attorney-General for New Brunswick. To succeed in supporting the legislation on the Geneva conventions the Dominion must in the final analysis establish two propositions or principles: (1.) That the Dominion has the capacity to create treaty obligations binding on the Provinces; and (2.) that the Parliament of Canada has power to perform such obligations. The first involves the performance of executive power; the second, the performance of legislative power. The word "treaty" is used as meaning international agreements. The Dominion have based their contention that the legislation is valid primarily on the Peace Treaty. If, however, they are driven from that ground, they take the position that the conventions would stand on their own legs. It is submitted, as to the Peace Treaty, that there was no obligation of any kind on which s. 132 of the British North America Act could operate. It was contended for the Dominion that "the matter" in art. 405, para. 5, of the Treaty of Versailles meant the matter of ratification. It is

(1) [1932] A.C. 304. (2) [1932] A.C. 54.
(3) (1882) 7 App. Cas. 829.

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suggested that it means the matter of the proposals. And the question which is the authority which is competent must be determined under the relevant laws of the particular member in relation to the actual matter dealt with by the proposals. Sect. 132 merely gives an overriding power. The subject-matter must be determined having regard to the other provisions of the British North America Act. On the correct view of the provisions of the latter part of the treaty the Dominion obtains no support through the operation of s. 132. That means that in the final analysis the conventions must stand on their own feet without any support whatever from the treaty. Considered on that footing, the first question is, to what executive act of the Dominion authorities can the appellant point as creating by treaty in the broad sense an obligation binding on the Provinces, and which Parliament is competent to perform. It seems obvious, so far as executive acts are concerned on which those conventions standing alone can be founded, that the search is limited to the resolution of the two Houses of Parliament adopting or approving each convention; to the Order of the Governor-General in Council; and to the order or decision of the Cabinet or Ministry.

Mr. McNair then dealt with the history and development of the treaty-making power in relation to the Provinces of Canada, and submitted the following propositions: (1.) Treaties made by His Majesty as sovereign head of the Empire bind in the diplomatic sense all parts of the Empire, and His Majesty's subjects therein so far as the provisions are applicable thereto. (2.) The treaty-making power is one of the prerogatives of the King which in the aggregate represents the residuum of discretionary sovereign power. (3.) Originally in Great Britain the treaty-making power and the treaty-performing power were vested in the same person. In other words, the King was sovereign in fact as in name. This simple relationship was affected by various constitutional developments in Great Britain and the Empire: *(a)* the growth of representative institutions; *(b)* Parliamentary sovereignty; (*c*) responsible government; (*d*) Colonial self-government; (*e*) the Federal system of government in Canada; and (*f*) the growth of the British Commonwealth of nations. Sect. 132 of the British North America Act does not provide for the withdrawal from the

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competence of the Provinces of matters allocated to them by the other provisions of the British North America Act—it merely gave the Parliament of Canada or the Dominion executive an overriding power. The power of legislating under the initial words of s. 91 of the British North America Act is an overriding power, to be exercised in a national emergency. [Reference was made to the *Aeronautics* case (1); and to arts. 407 and 408 of the Treaty of Versailles.]

With regard to the two propositions which I mentioned in opening, what are the treaty-making authorities to which the Dominion can conceivably point in this case? There are a number of possible authorities: (1.) The two Houses of Parliament which passed the resolutions; (2.) the Governor-General; (3.) the Governor-General in Council; (4.) the Dominion Cabinet; (5.) the Secretary of State for External Affairs; and (6.) Parliament. If the Dominion through any of these authorities has the right to exercise sovereign power over the Provinces in relation to treaty making, it must come from one of four sources: (1.) From the King by direct delegation; (2.) from the King by delegation acquiesced in; (3.) from Imperial statute; and (4.) from Dominion statute. No power from any source was given to any of the above bodies to enter into treaties binding upon the Provinces of Canada. The Dominion can only enter into agreements with other States in respect of matters which fall within her legislative competence.

The appellant has taken the position that in the *Radio* case (2) the Board decided that treaty obligations arising under international law were equivalent in all respects to contractual obligations arising under private law, and governed on all points by like principles. In other words, the Dominion maintains in the present case that the *Radio* case (2) decided that Canada by virtue of its new status—the Dominion authority having charge of external affairs—had acquired a capacity to contract, and that that capacity on the analogy of the principles of private law embraces, or extends to, not only the formation but the performance of contractual obligations. By advancing those proposals the Dominion reaches the position where it contends that the Parliament of Canada has achieved supremacy over the Provinces. The answer to that is that the acquisition of

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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the new status which Canada is supposed to have achieved affects nothing more than the constitutional position of Downing Street. If by virtue of a new status Canada is to have the right by treaties to change the law of the Provinces it should be by constitutional amendment.

The real gist of the judgment in the *Radio* case (1) is that radio was a new subject not embraced within the enumerated heads of s. 92 of the British North America Act, and that it fell either within the enumerated heads of s. 91 or within the residuary powers of the Dominion. If the principles in the judgment of the Chief Justice in the present case stand the Canadian Parliament has achieved supremacy, within limits, over the Provinces. It has never had it before, and it means that the principle enunciated by this Board about the object of the British North America Act in numerous cases is completely destroyed. [Reference was made to *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (2).] With regard to the position taken by Ontario so far as they based their suggestion that this legislation should stand on the ground of expediency, New Brunswick cannot accede to that principle in the case of constitutional legislation. What is good for one Province is not necessarily good for another.

1937 A.C. p. 338.

J. W. de B. Farris K.C. and *Wilfrid Barton* for the Attorney-General for British Columbia. British Columbia also wishes to dissociate itself from the submissions of Ontario supporting the legislation on the ground that it is intra vires the Dominion Parliament under the power conferred by s. 91 to make laws for the peace, order, and good government of Canada. If the legislation be upheld on that ground it will be even more fatal, even more of an invasion of Provincial rights, than if it is upheld under treaty-making powers. It would mean a declaration by the Board that matters which have in each Province been specifically set aside for that Province under s. 92 can now, by what is termed a change in recognition of conditions, be entirely eliminated from s. 92 and put into s. 91. [Reference was made to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3); *Toronto Electric Commissioners* v. *Snider*. (4)] If the Federal legislation be upheld it will mean that the legislation of British Columbia dealing with matters similar to those dealt with

1937 A.C. p. 339.

(1) [1932] A.C. 304.
(2) [1892] A.C. 437.
(3) [1896] A.C. 348, 361.
(4) [1925] A.C. 396, 410.

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by the legislation in question must go by the board. There is surely constitutional precedent for legislation by subordinate powers legislating to fulfil international obligations of the supreme authority. There are Provinces in Canada fully clothed with constitutional power to implement the obligations of the conventions. If there be now some added power given to Canada by her new relationship in the Empire which did not exist in 1867, while she may acquire that power in connection with her relations with foreign countries she has not acquired it in the sense of being given an overriding power that she never had in the balance of these two sections—91 and 92. [The preamble to the Statute of Westminster, 1931 (22 Geo. 5, c. 4), was read.] It is the nature of the subject-matter itself which determines the class into which it falls. The British North America Act, 1867, has been said to be in the nature of a treaty by which the Provinces surrendered certain of their rights and preserved others. The matters dealt with by the present legislation fall within s. 92—property and civil rights in the Province—and are therefore within the exclusive legislative competence of the Provinces. [Reference was made to the *Radio* case (1) and the *Aeronautics* case (2).]

With regard to art. 405 of the Treaty of Versailles, the Dominion has not brought the draft conventions before the authority or authorities "within whose competence the matter lies," and has not obtained the consent of those authorities as required by art. 405, paras. 5 and 7. As to s. 132 of the British North America Act, in cases of treaties where the subject-matter is, as it is in the present instance, clearly within s. 92, and where legislation by the Provinces, if enacted, is not only adequate, but is the best form of legislation to have, then it is neither necessary nor proper for the Dominion to step in until the Province has had a chance. The Provinces have been given no opportunity after ratification of saying whether they are prepared to fulfil their obligations. [Reference was made to *City of Montreal* v. *Montreal Street Railway*. (3)]

1937 A.C. p. 340.

Roebuck K.C. said that in treaties affecting subject-matters within the legislative competence of the Provincial Legislatures and bringing into operation the provisions of s. 132 of the British North America Act the King should

(1) [1932] A.C. 304, 312. (2) [1932] A.C. 54, 74, 76.
(3) [1912] A.C. 333, 345.

give his assent on the advice of his Provincial advisers as distinct from his Dominion advisers. It must be in respect of matters within the ordinary Dominion competence when the Dominion Ministers advise. There is nothing in the British North America Act which suggests that foreign affairs as affecting Provincial jurisdiction have been committed to the Dominion Government. The Province is as equally sovereign as the Dominion in its own sphere.

Robertson K.C. replied. There is a chain of obligations arising under the Treaty of Versailles—not created by the Treaty—in the performance of which Canada was bound to pass the legislation in question, and to pass it under s. 132 of the British North America Act. The Provinces have no status to enter into international obligations of any kind. They have only Provincial jurisdiction legislatively. Canada has the right to enter into international obligations so far as Canada is concerned. With regard to the growth and development of the treaty-making power, Canada has a duty to make treaties; nobody else can make them for her, and the question is, can she perform the treaties? If the argument for the Provinces is right, then at the same time that Canada's power and duty with respect to the making of treaties was growing her ability to perform them was being automatically lessened. One of the things upon which the parties were able to agree at confederation in respect of matters not provided for, not foreseen, was that they were to go to the Dominion. One of the outstanding dangers at the time of confederation, and to-day, is that of sectional interests and prejudices and private interests interfering with the good government of Canada as a whole. Reliance is placed on the residuary powers as covering the performance of treaty obligations: the *Radio* case. (1) [Reference was also made to *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (2)]

When a matter has attained an importance which outweighs the civil right of the individual, once it has reached that stage, then the civil right is lost sight of and the matter from an international aspect outshines it and is the one to

1937 A.C. p. 341.

(1) [1932] A.C. 304, 311, 313.
(2) [1923] A.C. 695.

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which attention should be directed. Here an international obligation has arisen and it is the duty of Canada to see that that obligation is performed. Canada alone can perform it, and Canada, therefore, in these particular circumstances and while the obligation endures, is the body to legislate because it is an international obligation. [Reference was made to *Bank of Toronto* v. *Lambe*. (1)] Is not the proper view that once Canada has properly created international obligations then it is necessary for the peace, order and good government of the Dominion that Canada should perform them? It is submitted that that is what is meant by the *Radio* case. (2)

1937. January 28. The judgment of their Lordships was delivered by LORD ATKIN. This is one of a series of cases brought before this Board on appeal from the Supreme Court of Canada on references by the Governor-General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, both because of the exceptional importance of the issues involved and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the British North America Act, 1867. It was argued for the Dominion that the legislation

1937 A.C. p. 342.

(1) (1887) 12 App. Cas. 575, 586. (2) [1932] A.C. 304.

could be justified either (1.) under s. 132 of the British North America Act as being legislation "necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries," or (2.) under the general powers, sometimes called the residuary powers, given by s. 91 to the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Provinces contended:—

As to (1.)—*(a)* That the obligations, if any, of Canada under the labour conventions did not arise under a treaty or treaties made between the Empire and foreign countries: and that therefore s. 132 did not apply. *(b)* That the Canadian Government had no executive authority to make any such treaty as was alleged. *(c)* That the obligations said to have been incurred, and the legislative powers sought to be exercised, by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2.), that if the Dominion had to rely only upon the powers given by s. 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the Legislatures of the Provinces—namely, property and civil rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII., Labour: to the procedure prescribed by it for bringing into existence labour conventions: and to the procedure adopted in Canada in respect thereto. The Treaty of Peace, signed at Versailles on June 28, 1919, was made between the Allied and Associated Powers of the one part and Germany of the other part. The British Empire was described as one of the Principal Allied and Associated Powers, and the High Contracting Party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers, and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with Part I. of the

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covenant of the League of Nations, by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the covenant were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations, of course, entered into not between members of the League, but between the high contracting parties, i.e., for the British Empire, His Majesty the King. Part XIII., entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and that such a peace can only be established if it is based on social justice, and that social justice requires the improvement of conditions of labour throughout the world, provides that the high contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects, and that the original and future members of the League of Nations shall be the members of this organization. The organization is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains arts. 405 and 407:—

"ARTICLE 405.

"(1.) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: *(a)* of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or *(b)* of a draft international convention for ratification by the Members.

1937 A.C. p. 344.

"(2.) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

"(3.) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization or other

special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

"(4.) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the Members.

"(5.) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

"(6.) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

"(7.) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

"(8.) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member. 1937 A.C. p. 345.

"(9.) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

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"(10.) The above Article shall be interpreted in accordance with the following principle:—

"In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned.

"ARTICLE 407.

"If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organization to agree to such convention among themselves.

"Any convention so agreed to shall be communicated by the Governments concerned to the Secretary-General of the League of Nations, who shall register it."

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present: and that at the stage of adoption it has no binding effect on the members: nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. "Ratification," therefore, as used in para. 7 of art. 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. "Consent to" or "accession to" would perhaps better describe the transaction which involves the creation for the first time of any obligation under the convention.

1937 A.C. p. 346.

In accordance with the provisions of Part XIII. draft conventions were adopted by general conferences of the International Labour Organization as follows:—

October 29-November 29, 1919, Conference.

Draft Convention limiting the hours of work in industrial undertakings.

October 25-November 19, 1921, Conference.

Draft Convention concerning the application of the weekly rest in industrial undertakings.

May 30-June 16, 1928, Conference.

Draft Convention concerning the creation of minimum wage-fixing machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates—namely, July 1, 1921, and January 1, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on March 1, 1935, Weekly Rest on March 1, 1935, and Minimum Wages on April 12, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of Commons of Canada approving them. The ratification was approved by order of the Governor-General in Council, was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennett, and was duly communicated to the Secretary-General of the League of Nations. The statutes, which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, "Hours of Work," on July 5, 1935, to come into force three months after assent; "Weekly Rest," on April 4, 1935, to come into force three months after assent; "Minimum Wage," on July 28, 1935, to come into force, so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened. In 1925 the Governor-General in Council referred to the Supreme Court questions as to the obligations of Canada under the provisions of Part XIII. of the Treaty of Versailles, and as to whether the Legislatures of the Provinces were the authorities within whose competence the subject-matter of the conventions lay. The answers to the reference, which are to be found in *In re Legislative Jurisdiction over Hours of Labour* (1), were that the Legislatures of the Provinces were the competent authorities to deal with the subject-matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province: and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject-matter before the Legislature of his Province, and to bring the matter before

1937 A.C. p. 347.

(1) [1925] Can. S.C.R. 505.

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the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not

1937 A.C. p. 348.

possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Reverting again to the original analysis of the contentions of the parties, it will be seen that the Provincial contention 1. *(b)* relates only to the formation of the treaty obligation, while 1. *(c)* has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation these questions do not arise. And, as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions 1. *(b)* and *(c)*, which in that event become immaterial. Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada was now vested in the Governor-General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in art. 405 of the Treaty of Versailles, and as to the effect of the time limits expressed both in art. 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them

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The first ground upon which counsel for the Dominion sought to base the validity of the legislation was s. 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case (1), and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case (1), that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event. A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions, a novus actus not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on s. 132, and their Lordships are in full agreement with them.

1937 A.C. p. 350.

If, therefore, s. 132 is out of the way, the validity of the legislation can only depend upon ss. 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by s. 92 assigned exclusively to the Legislatures of the Provinces, namely—property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court

(1) [1932] A.C. 304.

in 1925. How, then, can the legislation be within the legislative powers given by s. 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in s. 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case (1) and the *Radio* case (2) constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions. The *Aeronautics* case (1) concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sect. 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the *Radio* case (2) appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92, or even within the enumerated classes in s. 91. Part of the subject-matter of the convention, namely —broadcasting, might come under an enumerated class, but if so it was under a heading "Inter-provincial Telegraphs," expressly excluded from s. 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

1937 A.C. p. 351.

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect. If the position of Lower Canada, now

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separate the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

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But the validity of the legislation under the general words of s. 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have attained "such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial," and to have "become matter of national concern." It is interesting to notice how often the words used by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act (2) dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this, they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce* case (3)), "some extraordinary peril to the national life of Canada," "highly exceptional," "epidemic of pestilence" (*Snider's* case (4)), to show how far the present case is from the conditions which may override the normal distribution of powers in ss. 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on this point, and preclude further disputes.

1937 A.C. p. 353.

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But

1937 A.C. p. 354.

(1) [1896] A.C. 348.
(2) [1936] Can. S.C.R. 398, at 414 et seq.
(3) [1922] 1 A.C. 191.
(4) [1925] A.C. 396.

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the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court was equally divided and therefore the formal judgment could only state the opinions of the three judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is ultra vires of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR CANADA ..... } APPELLANT; Jan. 28.

1937 A.C. p. 355.

AND

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Compulsory unemployment insurance legislation—Insurance Act affecting civil rights in the Province—Within exclusive Provincial legislative competence—Invalid Dominion legislation—No severance—No special national emergency—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92 (13)—Employment and Social Insurance Act, 1935, St. Can. (25 & 26 Geo. 5, c. 38).

The Employment and Social Insurance Act, 1935, of the Parliament of Canada, which in substance provided for a system of compulsory unemployment insurance throughout Canada, was ultra vires of the Dominion Parliament. In pith and substance the Act was an insurance Act affecting the civil rights of employers and employed in each Province and was accordingly within the exclusive competence of the Provincial Legislatures under s. 92, head 13, of the British North America Act, 1867, which provided that "In each Province the Legislature may exclusively make laws in relation to . . . . (13) Property and civil rights in the Province."

The Act did not purport to deal with, and could not be supported on the ground of, any special emergency arising from the degree of unemployment in Canada at the relevant date.

The other parts of the Act were so inextricably mixed up with the insurance provisions of Part III. that it was impossible to sever them, and the whole Act was therefore ultra vires and invalid.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 427 affirmed.

APPEAL (No. 101 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by the Governor-General in Council by an Order dated November 5, 1935: "Is the Employment and Social Insurance Act, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The provisions of the Act, which was passed for the purpose of providing for the establishment of a national employment service and of a national insurance fund against unemployment,

1937 A.C. p. 356.

* *Present:*—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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as well as other forms of social insurance, are referred to in the judgment of the Judicial Committee.

The Supreme Court of Canada (Rinfret, Cannon, Crocket and Kerwin JJ., Duff C.J. and Davis J. dissenting) answered the question in the affirmative. The judgments of the Supreme Court are reported at [1936] Can. S.C.R. 427.

1936. November 5, 6 and 9. *R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The Employment and Social Insurance Act was adopted by the Canadian Parliament in 1935 as a remedial measure for a serious unemployment problem which had spread throughout the whole of Canada as a result of the prolonged trade depression. The scheme of the Act is to set up a national employment service and to establish a national insurance fund against unemployment. The objection to the validity of the Act is that it is said to be legislation of the central Parliament in relation either to property and civil rights within each Province or to matters local and private within each Province as to which exclusive legislative jurisdiction is by s. 92, heads 13 and 16, assigned to the Provincial Legislatures. Canada supports the legislation as a valid exercise of the powers of Parliament for the following reasons: (*a*) Because the main provisions of the legislation are a valid exercise of the powers of the Parliament of Canada under heads 1 and 3 of s. 91 of the British North America Act, 1867, to raise money by a system of taxation and to appropriate the same for the public purposes touching the peace, order and good government of Canada indicated by the legislation. (*b*) Because unemployment has attained such proportions as to render it unquestionably a matter of national interest and importance and as to affect the body politic of the Dominion. (*c*) Because unemployment, through the growing mechanization of industry and other economic causes has ceased to be merely a local or Provincial problem, and has become one of national proportions, interest and importance. (*d*) Because as the Provinces have no power to control the migration of labour from one Province to another, and Provincial boundaries do not affect the movement of labour, legislation to deal effectively with the unemployment problem must be national in its scope. (*e*) Because the legislation is not in pith and substance legislation to regulate property and civil rights in the Province, but is an effort

1937 A.C. p. 357.

by the Dominion to provide a remedy for a social and economic condition of national concern relating to the peace, order and good government of Canada and its trade and commerce. [Reference was made to the various provisions of the Act.]

The control of insurance has, no doubt, been held to be a matter within the Provincial field; that is as far as the decisions have gone. The following insurance authorities are referred to to ascertain whether in fact anything dealing with insurance is beyond the powers of the Canadian Parliament, and a subject exclusively within the Provincial jurisdiction: *Citizens Insurance Company of Canada* v. *Parsons*. (1) For the international trade of the country the uniformity of unemployment insurance is desirable: that is relied upon as indicating that the subject-matter dealt with is something which has a broader aspect than a local or private matter within the Province. It is not sought to justify this Act in its entirety as being an Act in relation to trade and commerce. It is submitted that it is not everything connected with insurance that is declared by the judgment in *Parsons'* case (2) to be within the exclusive Provincial jurisdiction, but only insurance contracts in their aspect of being property and civil rights within the Province. [Reference was made next to *Attorney-General for Canada* v. *Attorney-General for Alberta*. (3)] It is not so much a question of what are the forms or terms used by the Statute as what is the substance of what has been done. If all Parliament has done is to recognize that the present state of things requires that those who are unemployed shall receive something while unemployed, and if Parliament therefore has attempted to tax the community, or any part thereof, for the purpose of raising a fund to be distributed to the unemployed under certain conditions, there has not been any encroaching on any of the fields exclusively reserved to the Provinces. Parliament is not confined in the appropriation of the funds to objects which are within the enumerated heads of s. 91 of the British North America Act. When unemployment became general it was beyond the resources of the Provinces and Municipalities to cope with it, and the Federal Government provided a very large sum for the relief of unemployment.

1937 A.C. p. 358.

(1) (1881) 7 App. Cas. 96, 116. (2) Ibid. 96.
(3) [1916] 1 A.C. 588, 595-6.

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It was administered by the Municipal authorities subject to audit by both Provincial and Dominion authorities. Unemployment was from ocean to ocean, and the situation was one in which the humane feelings of every citizen of Canada were moved. [Reference was also made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), and to *In re Insurance Act of Canada.* (2)] In all the foregoing authorities the Dominion attempted to prescribe under what form insurance business was to be transacted, and throughout this line of cases there was always recognized that the capacity to do insurance business could be conferred by virtue of the central legislation, so that the power is not one which is exclusively within Provincial jurisdiction. [Reference was also made to *Dow* v. *Black.* (3)]

Although this might normally and under ordinary conditions be a matter local and private within the Province, the unemployment problem had reached such dimensions that it had become a threat to the body politic of the Dominion, and was therefore a matter proper to be dealt with by Dominion legislation. It would not be an emergency in the strict sense: *Russell* v. *The Queen* (4), *Hodge* v. *The Queen* (5), and *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (6) For a matter to be within Dominion legislative competence it must be something which has attained such dimensions as to affect the body politic of the Dominion. No doubt that rule can only be applied with great caution, and that raises the question of what the real situation is in fact: *John Deere Plow Co. Ld.* v. *Wharton.* (7) *Russell* v. *The Queen* (4) was discussed in *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (8), and in *Toronto Electric Commissioners* v. *Snider* (9), where the view was expressed that the Dominion could get authority to act only in cases of emergency. If the main object of the Act in question is, as is submitted, to abate an evil which is a threat to the body politic of the Dominion, then, though it may affect subjects which are in the enumerated classes of s. 92, it is competently enacted. The danger to the body politic of the Dominion can arise from an internal

1937 A.C. p. 359.

(1) [1924] A.C. 328.
(2) [1932] A.C. 41.
(3) (1875) L.R. 6 C.P. 272.
(4) (1882) 7 App. Cas. 829, 838.
(5) (1883) 9 App. Cas. 117, 130-1.
(6) [1896] A.C. 348, 359.
(7) [1915] A.C. 330, 339.
(8) [1922] 1. A.C. 191, 197, 200.
(9) [1925] A.C. 396, 410.

situation just as it can from a foreign enemy or other external menace. [Reference was made to the four propositions stated by Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), and to *In re the Regulation and Control of Aeronautics in Canada* (2), and *in re the Regulation and Control of Radio Communication in Canada.* (3)] This legislation is not something to attach statutory conditions to contracts of employment, it is legislation of Parliament assuming a burden as a function of government and dealing with that burden.

With regard to the facts which show the seriousness of the situation, the highest percentage of unemployed was 32·9, in March, 1933. By August, 1935, it was down to 17·4 per cent. Eleven per cent. was regarded by the statistical department as normal; but it was seasonal to some extent. Relief measures were adopted from 1930 to 1935, and the expenditure of the Dominion Government to relieve the unemployment situation during that period amounted to $192,291,683.

No Province could tax for the purpose of having the proceeds go into a Federal fund, and here there was a need for a national fund. This matter transcends property and civil rights in the Province, and the legislation should be held intra vires of the Parliament of Canada. There is more material before the Board indicative of necessity than was the case in *Russell* v. *The Queen.* (4)

1937 A.C. p. 360.

A. W. Roebuck K.C., Attorney-General for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Ontario does not take quite the same view of all the matters as the Dominion takes. Ontario desires to support this Act, however, because it is felt that it is in the public interest both in the Provinces and in the Dominion as a whole. Ontario's attitude, therefore, is that it is desirable to find means, if that is possible within the four corners of the constitution, by which the Act may be supported as a matter within Dominion jurisdiction. It is submitted that the legislation is within the overriding power of the opening words of s. 91, and is also within the residuary power—in a sense there is a distinction between those two. It comes within the overriding power

(1) [1930] A.C. 111, 118.
(2) [1932] A.C. 54, 71.
(3) [1932] A.C. 304, 311.
(4) 7 App. Cas. 829.

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of s. 91 taking things of extraordinary importance out of the local and private provisions of s. 92. No statistics can show the great extent of human suffering brought about by the economic position in Canada in recent years. Such a condition of affairs endangers the State. The following authorities seem to support in the main the contention as to the power of the Dominion to legislate in matters of sufficient national importance and to withdraw them from Provincial control: *Attorney-General for Canada* v. *Attorney-General for Alberta* (1); *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (2); *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (3); *Toronto Electric Commissioners* v. *Snider* (4) and *In re The Regulation and Control of Aeronautics in Canada.* (5)

If there is not sufficient evidence before the Board justifying this legislation under the overriding power of the Dominion Government, it is next submitted that the employment scheme as set up in this Act is not within head 13 of s. 92 of the British North America Act—"property and civil rights in the Province"—because the scope of the legislation is Dominion wide. It is not a question of competing legislation. A subject of nation wide legislation may and does incidentally affect the Provinces. The scheme of insurance being nation wide and not possible of enactment in the Provinces, it is not civil rights in the Province at all.

1937 A.C. p. 361.

With regard to the Dominion right of taxation, it is not conceded that the Dominion may tax everything everywhere and that the Provinces are left solely to what is left, but no objection is taken by Ontario to this particular taxation for this particular purpose.

J. B. McNair K.C., Attorney-General for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick.

Frank Gahan. There are three separate answers to the point of national emergency. First, all these matters were strenuously urged before the Supreme Court of Canada, and the six judges have found that the suggested emergency did not exist. It is submitted that this Board, on the same

(1) [1916] 1 A.C. 588.
(2) [1922] 1 A.C. 191.
(3) [1923] A.C. 695.
(4) [1925] A.C. 396.
(5) [1932] A.C. 54.

evidence, will hesitate to find that an emergency existed in Canada. Secondly, the Act by its very terms shows that it is not directed to an emergency. The frame of the Act is not designed immediately to deal with a national peril, because by s. 20, sub-s. 1, it is a condition of receiving any benefit under the Act that a person should have been in employment for forty weeks within the two years preceding. [Reference was also made to ss. 48; 23, sub-ss. 1, 2; s. 24, sub-s. 1 (*b*).] Thirdly, the evidence adduced is conclusive against this Act having been passed in respect of a national emergency: properly examined, it supports the view of the Supreme Court that no such emergency existed.

The answer to the argument that because there is a situation which extends throughout the nation requiring remedial measures it is a matter which does not fall within s. 92 is that according to the authorities the Dominion legislation must never encroach on the Provincial fields. It has never been suggested, unless the *Aeronautics* case (1) can be considered an exception, that, because legislation is framed to apply throughout the Dominion, therefore the subject-matter became a Dominion subject. The fact that the scheme could not be worked except on a Dominion basis has not been the test whether legislation is valid. The mere fact of convenience or greater efficiency cannot take the matter out of s. 92. [Reference was made to *Russell* v. *The Queen*. (2)] There is no reason why, with co-operation, this scheme should not be put into force. In the case of the Old Age Pensions Act, R.S.C. 1927, c. 156, the Dominion contributed 75 per cent. of the cost, and no one doubted that that was valid legislation. There would be no difficulty, by co-operation, in having such a scheme as that provided by the present Act without infringing Provincial rights. This is an Act relating to civil rights in the Province, and that position cannot be affected by the fact that the Dominion fund is contributing to the benefit that a person is to receive by virtue of his contract of employment. When the Act in question is examined it is purely an Act providing for compulsory insurance, and although the Minister of Finance of the Dominion is the conduit pipe through which the contributions flow into the fund, yet in fact the Act is creating a corporation which,

1937] A.C. p. 362.

(1) [1932] A.C. 54.

(2) 7 App. Cas. 829.

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although subsidized by the Dominion, is conducting an insurance business. It is in every way treated as a matter of civil liability.

The employment service provided by Part II. of the Act is largely and necessarily local, and with the exception of s. 14, sub-s. 4, is obviously dealing with local matters. This Act is proposing a scheme of compulsory insurance which is within property and civil rights in the Province, and is not valid legislation of the Dominion Parliament.

St. Laurent K.C. replied. Is this legislation in relation to property and civil rights in the Province within the meaning of those words in head 13 of s. 92, or is it in pith and substance legislation in relation to a problem which did not exist when the British North America Act was framed, and which was not specially provided for in any of the enumerated heads of ss. 91 and 92? It is submitted that it is the latter, and therefore a matter with respect to which legislative jurisdiction must be found in one or other of the residuary classes of ss. 91 and 92. It is not in pith and substance in relation to anything enumerated in the first 15 heads of s. 92, and therefore being something concerned with peace, order and good government in Canada is either within the general words of s. 91 or, if it is merely local and private within the Province, it is within the words of head 16 of s. 92. [Reference was made to *John Deere Plow Co., Ld.* v. *Wharton*. (1)] The legislation in its main purpose is not dealing with property and civil rights, but is dealing with something which must affect property and civil rights, but that is not the pith and substance of the matter which concerned the Legislature in enacting the Act. In the *Radio* case (2) Canada found itself bound to a foreign power in respect of something which was not provided for in either s. 91 or s. 92, but it had to be found somewhere in the British North America Act. The present matter was not an "emergency" in the sense in which that word is used in the *Board of Commerce* case (3) or the *Fort Frances case* (4); it involved a new function of government which circumstances forced on the Government of Canada. Does it make any difference that the fund, instead of being raised by general taxation of the whole of the Canadian

1937 A.C. p. 363.

(1) [1915] A.C. 330.
(2) [1932] A.C. 304.
(3) [1922] 1 A.C. 191.
(4) [1923] A.C. 695.

taxpayers, is as to a portion of it raised by compulsory levies from employers and employees? If it is taxation then Parliament has the right to use any mode or form of taxation.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the judgment of the Supreme Court, delivered on June 17, 1936, in the matter of a reference by the Governor-General in Council, dated November 5, 1935, asking whether the Employment and Social Insurance Act, 1935, was ultra vires of the Parliament of Canada. The majority of the Supreme Court, Rinfret, Cannon, Crocket and Kerwin JJ., answered the question in the affirmative, the Chief Justice and Davis J. dissenting. The Act in its preamble recited art. 23 of the Treaty of Peace, by which in the Covenant of the League of Nations the members of the League agreed that they would endeavour to maintain fair and humane conditions of labour (omitting, however, in the recital that this agreement was subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed), and art. 427 of the said treaty, by which it was declared that the well-being, physical, moral and intellectual, of industrial wage earners was of supreme international importance. It then recited that it was desirable to discharge the obligations to Canadian labour assumed under the provisions of the said treaty: and that it was essential for the peace, order and good government of Canada to provide for a national employment service and insurance against unemployment, etc. It consists of five Parts, Employment and Social Insurance Commission (ss. 4-9), Employment Service (ss. 10-14), Unemployment Insurance (ss. 15-38), National Health (ss. 39-41) and General (ss. 42-48). In substance the Act provides for a system of compulsory unemployment insurance. Part I. sets up a commission charged with administering the Act and obtaining information and making proposals to the Governor in Council for making provision for the assistance of persons during unemployment who would not be entitled to unemployment insurance benefit under Part III. Part II. provides for the organization by the commission of employment offices similar to the labour exchanges in the United Kingdom. Part III. provides for unemployment insurance, while Part IV. merely provides that the commission shall co-operate with other authorities in the

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Dominion or Provinces, and shall collect information concerning any plan for providing medical care or compensation in cases of ill-health. Part V. provides for regulations and reports. There are three schedules. The first defines employment within the meaning of Part III., and excepted employments, which include employment in agriculture and forestry, in fishing, and in lumbering and logging. The second enacts the weekly rates of contribution, and rules as to payment and recovery of contributions paid by employers on behalf of employed persons. The third enacts the rates of unemployment benefit, and supplementary provisions concerning the payment of unemployment benefit.

The substance of the Act is contained in the sections constituting Part III. They set up a now familiar system of unemployment insurance under which persons engaged in unemployment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons, and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or, if necessary, in certain cases by action.

There can be no doubt that, prima facie, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. Counsel did not seek to uphold the legislation on the ground of the treaty-making power. There was no treaty or labour convention which imposed any obligation upon Canada to pass this legislation, and the decision on this question in the reference on the three labour Acts does not apply. A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of, and for some

time previous to, the passing of the Act. On this point it becomes unnecessary to do more than to refer to the judgment of this Board in the reference on the three labour Acts, and to the judgment of the Chief Justice in the Natural Products Marketing Act which, on this matter, the Board have approved and adopted. It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

It only remains to deal with the argument which found favour with the Chief Justice and Davis J., that the legislation can be supported under the enumerated heads, 1 and 3 of s. 91 of the British North America Act, 1867: (1.) The public debt and property, namely (3.) The raising of money by any mode or system of taxation. Shortly stated, the argument is that the obligation imposed upon employers and persons employed is a mode of taxation: that the money so raised becomes public property, and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has

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collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed up with the insurance provisions of Part III. that it is impossible to sever them. It seems obvious, also, that in its truncated form, apart from Part III., the Act would never have come into existence. It follows that the whole Act must be pronounced ultra vires, and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA..... } APPELLANT;

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AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Criminal Code—Additional section—Specified trade practices made indictable offences—Constitutional validity—Criterion of "wrongness"—Prohibition of act in public interest—Criminal law not used as pretext to invade Provincial legislative field—Not legislation in pith and substance only interfering with civil rights in the Province—Section valid Dominion legislation—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (2) (27)—An Act to Amend the Criminal Code, 1935, St. Can. (25 & 26 Geo. 5, c. 56), s. 9.

Sect. 498A of the Criminal Code of Canada, which was introduced into the Code by s. 9 of an Act to Amend the Criminal Code (25 & 26 Geo. 5, c. 56), provided that:—

"Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor":— 1937 A.C. p. 369.

Held, that the section was in toto intra vires of the Parliament of Canada under s. 91, head 27, of the British North America Act, 1867,—"The Criminal Law, ..." There was no reason for supposing that the Dominion were using the criminal law as a pretence or pretext for invading the Provincial legislative field, or that the legislation was in pith and substance only interfering with civil rights in the Province.

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* *Present:*—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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The only limitation on the plenary power of the Dominion to determine what should or should not be criminal was the condition that Parliament should not in the guise of enacting legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92 of the British North America Act. It was no objection that it did in fact affect them, for if it was a genuine attempt to amend the criminal law it might obviously affect previously existing civil rights.

There was no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.

Proprietary Articles Trade Association v. *Attorney-General for Canada* [1931] A.C. 310 applied.

There seemed to be nothing to prevent the Dominion, if it thought fit in the public interest, from applying the criminal law generally to acts and omissions which so far were only covered by Provincial enactments.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 363 affirmed.

APPEAL (No. 102 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 5, 1935:—"Is s. 498A of the Criminal Code, or any or what part or parts of the said section ultra vires of the Parliament of Canada?"

The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.) unanimously held that sub-ss. (*b*) and (*c*) of s. 498A were not ultra vires; and by a majority (Cannon and Crocket JJ. dissenting) held that sub-s. (*a*) was also not ultra vires. The judgments of the Supreme Court are reported at [1936] Can. S.C.R. 363.

1936. Nov. 9, 10. *J. W. de B. Farris K.C.* for the Attorney-General for British Columbia. I propose to deal first with sub-s. (*a*), because all the Provinces are more concerned with the principle than with the immediate effect of sub-ss. (*b*) and (*c*), and if the principle is established in sub-s. (*a*) it becomes a secondary consideration whether it applies equally to sub-ss. (*b*) and (*c*), but it is submitted that it does. Sub-sect. (*a*) is an invasion of the field of Provincial rights and is not criminal law in the proper sense of the words. The amendment of the Code was to give effect to recommendations in the Report of the Royal Commission on Price Spreads. The Report of the Royal Commission on Price Spreads had nothing to do with criminal law at all; it was a document dealing with trade practices: the Commission was one whose problem

1937 A.C. p. 370.

was entirely that of investigating and making representations in regard to trade practices in Canada. The legislation deals with "Property and civil rights in the Province" —the subject of head 13 of s. 92 of the British North America Act. A test for determining the character of legislation also laid down in various other cases appears in *Toronto Electric Commissioners* v. *Snider*. (1) This legislation must be considered not merely in the form in which it appears, but in its pith and substance; it is really subject-matter affecting property and civil rights. It does not come within s. 92, head 16—"matters of a merely local or private nature in the Province"—but in head 13, supplemented by head 15—"the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Taking those two headings, 13 and 15, and looking at the language of s. 498A, it is submitted that this enactment could have been passed by any Province in Canada in relation to any business carried on in that Province. This is unquestionably legislation within property and civil rights: *City of Montreal* v. *Montreal Street Railway* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (3); *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (4); *Toronto Ry. Co.* v. *Toronto City* (5); *and Hodge* v. *The Queen*. (6)

If at any time the Parliament of Canada could show that these trade practices had become such an abuse that they imperilled the national business life of Canada, and so created an emergency comparable to war or pestilence, then without doubt the Dominion Parliament could legislate under peace, order, and good government on the theory that the matter so transcended Provincial powers that it really created an exception. 1937 A.C. p. 371.

[LORD ATKIN: An emergency is not required for criminal law at all. The momentous question is whether this is fairly within the scope of criminal law.]

The Attorney-General for Canada contends that "criminal law" as used in head 27 of s. 91 of the British North

(1) [1925] A.C. 396, 406.
(2) [1912] A.C. 333, 343.
(3) [1916] 1 A.C. 588, 597.
(4) [1922] 1 A.C. 191, 197.
(5) [1920] A.C. 446, 452.
(6) (1883) 9 App. Cas. 117, 130.

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America Act means "the criminal law in its widest sense": *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1); and he also relies in his case on the judgment in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2), where the power of the Dominion to legislate in relation to matters falling within the class of subjects "the Criminal law . . . . including the procedure in criminal matters" was discussed. Neither of those two cases can possibly be supported in the wide way in which they have been interpreted in the factum of the Attorney-General for Canada. In the *Hamilton Street Railway* case (1) there was no such problem as arises in the present case. The judgment in the *Proprietary Articles Trade Association* case (2) as well as that in the *Hamilton Street Railway* case (1) must be read with limitations: it must be borne in mind that what is being considered in the present case is not a test of criminal law as it would be understood in a definition of that form of legislation, but criminal law as it must be understood in s. 91 (27). There must be a field of criminal law in its widest definition that is provincial: *Rex* v. *Nat Bell Liquors, Ld.* (3) Whatever be the true test, criminal law must involve some idea of moral wrong or guilt.

1937 A.C. p. 372.

It is submitted that it has been established, first, that this legislation if limited to the Provinces would be competent to them; secondly, that the Dominion by extending the legislation to all the Provinces cannot change the nature of the subject; and, thirdly, that criminal law in s. 91 (27) is not used in the widest sense in which criminal law may be defined. The scheme of s. 498A in the first place is to prevent the middleman having an advantage over his competing middleman, and that is a matter which the Provinces before the date of this legislation had full jurisdiction to deal with as being the regulation of trade in its local aspects. In substance, if not in form, the legislation is a direct invasion of property and civil rights, and therefore the burden is on the Dominion to show that it is really criminal law: *L'Union St. Jacques de Montreal* v. *Bélisle.* (4) This subject-matter did not become criminal law until the Dominion had so legislated: until it was criminal law the Dominion had no jurisdiction, therefore the Dominion could not

(1) [1903] A.C. 524, 528.
(2) [1931] A.C. 310.
(3) [1922] 2 A.C. 128, 168.
(4) (1874) L.R. 6 P.C. 31, 35-6.

acquire jurisdiction by legislation not competent to the Dominion until the jurisdiction had been acquired. This legislation is an encroachment on the Provincial field, and the Dominion have passed it as the only available method of regulating what they desired to regulate.

In the following authorities the Dominion power of legislation was limited to cases in which the evil had become so great that it could be dealt with under the general powers for the peace, order and good government: *City of Montreal* v. *Montreal Street Railway* (1); the *Board of Commerce* case (2); *Toronto Electric Commissioners* v. *Snider* (3); and the *Proprietary Articles Trade Association* case (4). My complaint is limited to cases which hitherto have not been criminal law, and are only made a new crime in connection with the subject-matter of property and civil rights. With regard to sub-ss. *(b)* and *(c)*, and the mere fact that they deal with combinations, etc., there is nothing in those words which is against public interests.

A. W. Roebuck K.C., A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Ontario is passive with regard to sub-ss. *(b)* and *(c)*: they appear to be unimportant, and the Province is not much concerned about them. It is felt, however, that they do come within criminal law—nearer to it than does sub-s. *(a)*—because there are evidenced in them the general characteristics of criminal law. In a sense we support sub-ss. *(b)* and *(c)*, but we are very much opposed to sub-s. *(a)*, not that it has a very great economic effect, but it violates the very fundamentals of our constitution and will, if held to be valid, set a precedent for this type of legislation. From the standpoint of criminal law there is practically no substance in it; from the standpoint of property and civil rights there is so much that in pith and substance it falls within the latter class. In the Act it is not so much the substance but rather the form of the transaction that is being regulated. There is nothing in sub-s. *(a)* which suggests in any degree that it is either excessive or contrary to the public interest. It is as far away from our conception of criminal law as anything can be, but as a regulation of trade it is directly in point. It says that commercial

1937 A.C. p. 373.

(1) [1912] A.C. 333, 344.
(2) [1922] 1 A.C. 191, 197.
(3) [1925] A.C. 396, 407, 409-10.
(4) [1931] A.C. 310.

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transactions, and particularly businesses, shall be carried on in particular ways. The purpose of this legislation is with regard to the regulation of contracts rather than to the very strained and doubtful regard of the public interest such as constitutes criminal law. [Reference was made to the *Board of Commerce* case (1); *Attorney-General for Canada* v. *Attorney-General for Alberta* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers* (3); *Toronto Electric Commissioners* v. *Snider* (4); and *Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code*. (5)] The Act considered in the *Proprietary Articles Trade Association* case (6) and that now being dealt with are utterly different. *In re Insurance Act of Canada* (7) does not add much to the *Reciprocal Insurers* case. (3)

1937 A.C. p. 374.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick: New Brunswick takes up the identical attitude of British Columbia. [Reference was made to passages in the Report of the Royal Commission on Price Spreads.]

R. S. Robertson K.C., *L. S. St. Laurent K.C.*, *C. P. Plaxton K.C.*, *Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The section in question is valid Dominion legislation under head 27 of s. 91 of the British North America Act—"The Criminal law." It has been contended that the jurisdiction given to the Dominion by s. 91 (27) does not cover criminal law in its widest sense, as those words were used by this Board in the *Proprietary Articles Trade Association* case (6): and it has been said that if the legislation affects property and civil rights then it is beyond the competence of Parliament. That, it is submitted, is covered by what was said in the *Proprietary Articles Trade Association* case (6), and it is also covered by the words in s. 91 that "it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated"; and "Criminal law" is one of them. Sect. 498A is of similar character to portions

(1) [1922] 1 A.C. 191, 197.
(2) [1916] 1 A.C. 588, 595.
(3) [1924] A.C. 328, 337.
(4) [1925] A.C. 396, 402, 403.
(5) [1929] Can. S.C.R. 409, 412.
(6) [1931] A.C. 310, 323.
(7) [1932] A.C. 41.

of s. 508 of the Criminal Code, which deals with "Insurance offences." The appellant contends that this is something else disguised as criminal law, and that it is not good criminal law; in support of that view he relies on the *Reciprocal Insurers* case (1), the *Board of Commerce* case (2), and the *Snider* case (3). The significant feature of all those cases is that the penal clauses were in each case merely ancillary to another purpose. The present legislation is not ancillary to anything else; it is all here in this one section; there is no other purpose to be carried out. It is to prohibit the conduct referred to and to punish those who commit such conduct. There is no basis here for the contention that was set up in the other cases. It is quite impossible to say that there are not cases which come well within sub-s. *(a)*, so that it has an application: if it operates at all it operates as criminal law and nothing else.

1937 A.C. p. 375.

There was no reply.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a judgment of the Supreme Court of Canada, delivered on June 17, 1936, on a reference by the Governor-General in Council, dated November 5, 1935, raising the question whether s. 498A of the Criminal Code is ultra vires of the Parliament of Canada. The Supreme Court unanimously held that sub-ss. *(b)* and *(c)* were not ultra vires, and by a majority, the Chief Justice, Rinfret, Davis and Kerwin JJ., Cannon and Crocket JJ. dissenting, held that sub-s. *(a)* also was not ultra vires. Sect. 498A was introduced into the Criminal Code by s. 9 of 25 & 26 Geo. 5, c. 56, the title of which is "An Act to Amend the Criminal Code."

[His Lordship read s. 9, and continued:] Their Lordships agree with the Chief Justice that this case is covered by the decision of the Judicial Committee in the *Proprietary Articles* case. (4) The decision in that case seems to be inconsistent with the ground of dissent of Crocket J. that sub-s. *(a)* lacks "the characteristic feature of crime, viz., the intent to do wrong." The basis of that decision is

(1) [1924] A.C. 328.
(2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.
(4) [1931] A.C. 310.

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that there is no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal. Cannon J. was of opinion that the prohibition cannot have been made in the public interest because it has in view only the protection of the individual competitors of the vendor. This appears to narrow unduly the discretion of the Dominion Legislature in considering the public interest. The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do. No doubt the plenary power given by s. 91 (27) does not deprive the Provinces of their right under s. 92 (15) of affixing penal sanctions to their own competent legislation. On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province. Counsel for New Brunswick called the attention of the Board to the Report of the Royal Commission on Price Spreads, which is referred to in the order of reference. It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the Provincial field, the existence of the report appears to be a material circumstance. Their Lordships are in agreement

1937 A.C. p. 376.

with the decision of the majority of the Supreme Court. They are of opinion that no part of the section is ultra vires: and they will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

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[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA..... } APPELLANT;

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AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Natural products marketing legislation—Powers of Marketing Board—Regulation of transactions completed in the Province—"Property and civil rights in the Province" affected—Legislation invalid—Provisions not severable—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (2); s. 92 (13)—Natural Products Marketing Act, 1934, St. Can. (24 & 25 Geo. 5, c. 57)—Natural Products Marketing Act Amendment Act, 1935, St. Can. (25 & 26 Geo. 5, c. 64).

The Natural Products Marketing Act, 1934, of the Parliament of Canada, as amended by the Natural Products Marketing Act Amendment Act, 1935, which provided (inter alia) for the establishment of a Dominion Marketing Board whose powers included powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, and to determine the manner of distribution, and the quantity, quality, grade or class of the product that should be marketed by any person at any time, was ultra vires of the Dominion Parliament.

The provisions of the Act, in addition to dealing with the regulation of foreign export and inter-Provincial trade, also covered transactions in any natural product which were completed within the Province and which had no connection with inter-Provincial or export trade. The regulation of "trade and commerce" by the Dominion under head 2 of s. 91 of the British North America Act, 1867, did not permit the regulation of individual forms of trade or commerce confined to the Province, and the legislation in question, therefore, in so far as it related to matters which were in substance local and Provincial and affected "property and civil rights," a subject-matter exclusively reserved to the Provincial Legislature under head 13 of s. 92 of the British North America Act, was beyond the competence of the Dominion Parliament.

1937 A.C. p. 378.

The whole texture of the Act was inextricably interwoven and neither s. 9, which dealt with inter-Provincial or export trade, nor Part II., which was a genuine exercise of the Dominion legislative authority over criminal law, could be contemplated as existing independently of the main legislation and must fall with it as being in part merely ancillary to it.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 398, affirmed.

APPEAL (No. 103 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by

* *Present*:—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

Order of the Governor-General in Council, dated November 5, 1935: "Is the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The scheme of the Act is referred to in the judgment of the Judicial Committee.

The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.) unanimously answered the question in the affirmative. The judgment of the Supreme Court is reported at [1936] Can. S.C.R. 398.

1936. November 23, 24 and 26. *J. W. de B. Farris K.C.* and *Wilfrid Barton* for the Attorney-General for British Columbia. The Supreme Court unanimously held that the Act was ultra vires as a whole on the general grounds, first that it did not come within "trade and commerce" as those words were used in s. 91 of the British North America Act, and secondly, that it did not come within peace, order and good government under s. 91. In effect, what the Chief Justice said was that so far as this Act dealt with inter-Provincial and international trade it was within Dominion jurisdiction; but he said that the trouble was that it also undertook to deal with trade in its purely local aspects as property and civil rights. It is submitted that there are really practical reasons why this legislation should be supported: it was obviously designed to fit in along with Provincial Acts in relation to marketing. Every Province of Canada did pass a Provincial Marketing Act expressly to dovetail in with the Federal Act. Experience in British Columbia showed that the two Acts were working in complete accord: the same Board could function in two capacities—both as a Federal and as a Provincial Board. As a matter of construction the Federal Act should be construed as relating only to Federal matters; and if this Board finds it necessary to construe the Act as invading the Provincial fields, it should be declared invalid only so far as it trenches on Provincial matters. [Reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (1), the legislation in question, and the Marketing Acts passed by the various Provinces, that of British Columbia being the Natural Products Marketing (British Columbia) Act, 1934 (24 Geo. 5, c. 38).] The only

1937 A.C. p. 379.

(1) [1914] A.C. 237.

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controversy is whether it is necessary to say that the whole Act must be void, or whether it is sufficient to say that the enactment in so far is it relates to matters local and Provincial is beyond the jurisdiction of Parliament: *In re The Initiative and Referendum Act* (1); *Great West Saddlery Co.* v. *The King* (2); *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (3) The enactment is valid to the extent to which it is not in excess of the powers of the Dominion Parliament: *The King* v. *Vizzard; Ex parte Hill* (4), and *Willard* v. *Rawson.* (5) [Reference was also made to *Newcastle and Hunter River Steamship Co., Ld.* v. *Attorney-General for the Commonwealth.* (6)]

Wilfrid Barton followed. The powers given to the Board under s. 4, sub-s. 1, of the Act are in no sense absolute powers; they are given only to regulate natural products on a condition, that is, when the product has been declared a regulated product: and none of these powers come into operation until the field for their exercise has been declared. The regulated product is a product to which a scheme approved under this Act relates. There must therefore be a scheme before any of the powers of s. 4, sub-s. 1, come into operation.

1937 A.C. p. 380.

The provisions of the Act are clearly severable, as the Act provides in s. 26; they are provisions which apply to three different things—a scheme dealing with all products, which is bad; a scheme dealing with export products, which is entirely good; and a scheme dealing with inter-Provincial trade, which is likewise good. It is submitted, first, that with regard to all schemes operating within Dominion competence, that is, in matters of export and inter-Provincial trade, the Act is wholly good; and secondly, that where the Act has in toto been adopted by a Provincial Legislature it has behind it the whole combined force of the sovereignty of the Dominion and the Province, and is valid. The matters in s. 9 are severable. With regard to s. 22, the criminal section, that is plainly valid and within the competence of the Dominion.

R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright and *R. St. Laurent* for the Attorney-General for Canada. The Attorney-General for Canada is

(1) [1919] A.C. 935, 944.
(2) [1921] 2 A.C. 91, 124.
(3) [1925] A.C. 561, 567-8.
(4) (1933) 50 C.L.R. 30, 56, 70.
(5) (1933) 48 C.L.R. 316, 326.
(6) (1921) 29 C.L.R. 357, 368.

satisfied with the principles enunciated in the reasons for the judgment of the Chief Justice. He nevertheless supports the appeal, because it is submitted that the short answer given in the formal judgment really goes beyond the reasons expressed by the Chief Justice. The Chief Justice and his colleagues came to the conclusion that there was nothing of consequence in the statute beyond ss. 3, 4 and 5. If possible, the formal judgment should be amplified to the extent of having it really conform to the reasons for judgment enunciated in the Chief Justice's judgment. In view of s. 26, Part II. is clearly severable from Part I., and there is nothing in Part II., or in the reasons for judgment, which would entitle one to say that it was not valid legislation. The legislation is in substance concerned with the regulation of export and inter-Provincial trade and exerts control over local trade only as a necessary incident of effective regulation of export and inter-Provincial trade: the legislation is, therefore, legislation in relation to the regulation of trade and commerce under head 2 of s. 91 of the British North America Act. [On the question of the invalidity of certain Provincial Acts dealing with similar matters, reference was made to *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1) and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.* (2)] Part II. of the present Act is a valid enactment, and is comparable with the enactment which was held to be valid in the *Proprietary Articles Trade Association* case (3); and the provision in s. 22 is exactly similar to the provision in s. 32 of the Combines Investigation Act held to be valid in the last mentioned case. (3)

1937 A.C. p. 381.

It has been repeatedly held that all powers proper for the self-administration of the Dominion and its Provinces were imparted to one or the other of the Legislatures, and that what was not in one was of necessity in the other. It would seem to be a reasonable construction of the powers of the two legislative authorities that having between them the whole of the powers they should be able to exercise them in such a way as is proper for the good administration of the inhabitants. *The King* v. *Eastern*

(1) (1931) Can. S.C.R. 357, 362, 365.
(2) [1933] A.C. 168, 176.
(3) [1931] A.C. 310.

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Terminal Elevator Co. (1) can be distinguished. [Reference was also made to *Caron* v. *The King*. (2)] Even if s. 5 cannot be supported at all, s. 9 is clearly a valid enactment in relation to export and inter-Provincial trade. If ss. 5, 6, 7 and 8 were eliminated there would still remain the Board, its powers, and the scheme under s. 9. Sect. 12 is also severable; ss. 13, 14 and 15 are merely ancillary. Sects. 5, 6, 7 and 8 are the only ones which can possibly offend.

A. W. Roebuck K.C., *A.-G.* for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. If s. 9 stood by itself, with a definition of a regulated product, and the formation of the Board, with the marketing limited to export or inter-Provincial trade, there would not be much objection to it from the point of view of the Provinces. The Act, however, is undoubtedly an invasion of the Provincial field, and s. 9 cannot be severed from the Act as it is now before this Board. This Act being in its pith and substance one that regulates local trade within the Province, s. 9 is only a section to give colour, and the whole Act is ultra vires. The Act was dressed up in the guise of legislation dealing with export and inter-Provincial trade: s. 9 is merely an ancillary or incidental provision to the main object of the Act. The Parliament of Canada in purporting to legislate for export and inter-Provincial trade cannot regulate local trade within the Province and appropriate to itself a field in which it can exercise no legal authority.

1937 A.C. p. 382.

The appellant contends that in view of the provisions of s. 26 as a matter of construction the Act should be construed as relating only to Federal matters, and that they can be severed, so that that part of the Act which relates to Federal jurisdiction should remain. It is submitted that irrespective of any declaration of intention such as is contained in s. 26, it is for the Court to determine whether the Act is severable or not having regard to the whole Act and its main features and its real essence. Sect. 26 is simply a declaration of good intentions, and such a declaration expressed in an Act does not bind the Court. In the Australian cases which have been referred to the sections which were severable were sections which could properly be severed. [Reference was made to *The King* v. *Eastern*

(1) [1925] Can. S.C.R. 434. (2) [1924] A.C. 999, 1003.

Terminal Elevator Co. (1) and *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction.* (2)] This was an Act designed for the purpose of invading the Provincial field, and to regulate men and companies in commercial business in the Provinces, and it was then dressed up by putting in s. 9. The whole Act is ultra vires. Sect. 22 of the Act is already on the Statute Book under s. 498A of the Criminal Code: Part II. is interwoven with Part I., which is the main portion of the Act regulating trade within the Province, and is ancillary to it.

Gustave Monette K.C. for the Attorney-General for Quebec. The Act does not regulate anything, it delegates the power to a Board to regulate. There are no general rules in the Act applicable to trade as such, nor to export or inter-Provincial trade. The main objects of the Act were, first, to regulate one product at a time, and secondly, to regulate the minor details of products without any distinction. [Reference was made to s. 5, sub-s. 4 *(a)*, *(b)*, *(d)* and *(f)*.] The pith and substance of the Act is found in s. 4, sub-s. 1 *(a)*, to regulate the minor details of trade locally, and in so regulating it there appears to be no rule of general concern with regard to inter-Provincial or export trade. The provisions which deal genuinely with inter-Provincial trade are ancillary: ss. 9, 11. The main feature about the local Board is that it comes under s. 4, sub-s. 2, and it is a local Board which is being created under a scheme, and the scheme comes from s. 5. If s. 5 goes, then the local Board goes.

1937 A.C. p. 383.

On the question of severance: first, the principle is that this Board (the Judicial Committee) is not to amend the legislation; secondly, in applying the rule of severance care should be taken not to change the meaning, for if one section is taken away it may well be that the meaning of the rest is changed. The most that can be derived from s. 26 is that there is there a declaration that Parliament would probably have enacted separately such sections as would be found separately to be legal. But such a declaration must be treated with caution. It is submitted that Part II. is ancillary and is not severable; it comes within s. 92 (15) of the British North America Act. Canada in her Case has admitted that Part II. is ancillary, and their admission is binding on them. The pith and substance of Part II. is to

(1) [1925] Can. S.C.R. 434, 446. (2) [1931] Can. S.C.R. 357, 371.

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provide a helpful function to Part I. in making it a crime for the intermediary to make an excessive spread. The investigation powers in s. 17 in Part II. are also intended solely to be helpful to Part I. Mr. St. Laurent said that the power to pass the Act in question now belongs to the Dominion under their power to legislate in respect of the criminal law, and that it is for the Dominion and not for the Province to regulate a combine. That is fallacious, because the power to make a crime does not import the power to regulate. As to the possibility of arriving at a general scheme of marketing, a Federal Act could be passed dealing with export and inter-Provincial trade, and the Provinces could pass one dealing with matters of Provincial concern, and there could be power in each to delegate powers to the other's Board. Quebec does not want its local trade to be regulated by the Dominion.

1937 A.C. p. 384.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick. New Brunswick realizes the difficulty in framing marketing schemes, and has in this case passed an Act intended to co-operate with the Dominion Act. The Act has never come into operation. Quebec has taken up the same attitude, and I adopt the argument of Mr. Monette. The question of co-operation with the Dominion has been considered in *City of Montreal* v. *Montreal Street Ry.* (1), and the inference to be drawn is that although co-operation is possible each legislative body must keep strictly to its own sphere. With regard to s. 26, the provisions here are distinguishable from the provisions in the Australian cases. In those cases the provision was that there was to be an enactment, but that it was not to operate in so far as its operation would be in violation of the provisions of the Constitution: *Newcastle and Hunter River Steamship Co., Ld.* v. *Attorney-General for the Commonwealth* (2); *Willard* v. *Rawson.* (3) In construing an Act of Parliament, with one possible exception, the rule as to severance would be the same as in construing private documents: *Attwood* v. *Lamont* (4)—the one qualification is that in restraint of trade cases the Courts do not seek to assist the contracting party who inserts too wide a restraint, whereas in construing a public Act the Courts would, if possible, uphold the validity.

(1) [1912] A.C. 333, 346.
(2) (1921) 29 C.L.R. 357, 369.
(3) (1933) 48 C.L.R. 316, 326.
(4) [1920] 3 K.B. 571, 593.

Applying that principle, the Supreme Court came to a right conclusion when they said that this was an Act for a coherent scheme. It is submitted that the whole Act constitutes one unit: if part is invalid then the whole Act is invalid.

J. W. de B. Farris K.C. replied. There is a very close analogy between the present case and the *Newcastle and Hunter River Steamship* case (1) on the facts and the issues which arose, and the language in the enactment in the latter case involved the same matter that is suggested here as the reason why there cannot be a severance. The Australian case is not only an authority, it is a demonstration—it has been done in that way in Australia. [Reference was made to the Navigation Act, 1913, Acts of the Commonwealth, vol. 12, s. 14.] It is conceded that s. 26 of the present Act and s. 2, sub-s. 2, of the Australian Act are in different words, but in their essentials they both lead to the same result. With regard to *Attwood* v. *Lamont* (2), first, if a covenant which is inseverable has in it an element of invalidity as against public policy, it necessarily follows that that covenant is invalid; secondly, a different principle applies in dealing with Acts of Parliament and private contracts. If s. 5 is blue-pencilled out of existence, the Minister can still formulate a scheme under s. 9, and provide in the scheme for a local Board. Sect. 4 is perfectly valid applied only to inter-Provincial and export trade. Provisions which might be considered only ancillary in the ordinary legislation are not necessarily only ancillary in view of the express provisions of s. 26.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the Supreme Court on a reference by the Governor-General in Council, dated November 5, 1935, raising the question whether the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, is ultra vires of the Parliament of Canada. The Supreme Court unanimously answered the question in the affirmative.

The Act consists of two parts. The first provides for the establishment of a Dominion Marketing Board whose powers include powers to regulate the time and place at

(1) (1921) 29 C.L.R. 357, 369. (2) [1920] 3 K.B. 571.

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which, and the agency through which, natural products to which an approved scheme relates shall be marketed, and to determine the manner of distribution and the quantity, quality, grade or class of the product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated products of any grade, quality or class.

There are other regulatory powers which need not be further specified. A scheme to regulate the marketing of a natural product is initiated by a representative number of persons engaged in the production or marketing of the natural product. It can be referred by the appropriate Minister to the Board, and if they approve the scheme as submitted or amended by them, and it is further approved by the Minister, the Governor-General in Council may approve the scheme. It is essential that the Governor-General in Council shall be satisfied either that the principal market for the natural product is outside the Province of production, or that some part of the product produced may be exported. The latter provision makes it clear that the regulation may apply to marketing transactions in natural products which have nothing to do with foreign export or inter-Provincial trade. If the Minister is satisfied that trade and commerce in a natural product are injuriously affected by the absence of a scheme prepared as above he may himself propose a scheme for approval of the Governor in Council. The Governor in Council is given power by order or regulation to regulate or restrict importation into Canada of a natural product which enters Canada in competition with a regulated product: and to regulate or restrict the exportation from Canada of any natural product. Part II. contains provision for the appointment by the Minister of a Committee who may be entrusted with the duty of investigating all matters connected with the production or marketing of natural or regulated products for the purpose of ascertaining the charges made in distribution of a natural or regulated product. The receipt against the interest of the public of an excessive charge is made an indictable offence, and there are provisions for the trial of such offences.

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with

inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of s. 91—namely, The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-Provincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province. In his judgment the Chief Justice says (1): "The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade and committing the regulation of external and inter-provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority: *The King* v. *Eastern Terminal Elevator Co.* (2)"

1937 A.C. p. 387.

Their Lordships agree with this, and find it unnecessary to add anything. There was a further attempt to support the Act upon the general powers to legislate for the peace, order and good government of Canada. Their Lordships have already dealt with this matter in their previous judgments in this series and need not repeat what is there said. The judgment of the Chief Justice in this case is conclusive against the claim for validity on this ground. In the result, therefore, there is no answer to the contention that the Act in substance invades the Provincial field and is invalid. It was, however, urged before us that portions of the Act, notably s. 9 in the first Part, and the whole of Part II., are within the competence of Parliament. Sect. 9 because it only purports to deal with inter-Provincial or export trade; and Part II. because it goes no further than the similar provisions in the Combines Investigation Act, and is a genuine exercise of the Dominion legislative authority over criminal law. Reference was made to s. 26 of the Act, which is in these terms: "If it be found that Parliament has exceeded

1937 A.C. p. 388.

(1) [1936] Can. S.C.R. 412. (2) [1925] Can. S.C.R. 434.

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its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or ultra vires, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained."

It is said that this is a plain indication of the intention of the Legislature to pass any portion of the Act which might be valid in itself, in however truncated form the whole Act is left after rejecting the other portions. Moreover, counsel for British Columbia urged the Board to make a declaration that it was only so far as authority was conferred on the Board to deal with local matters not necessarily ancillary to the main power that the Act was ultra vires, and that the validity of each scheme must be determined as matters arise under it. No such declaration was asked for from the Supreme Court. British Columbia did not even appear at the hearing in Canada: and there is no claim for such a declaration in the case filed before this Board. It is of special importance in constitutional questions that this Board should, if possible, have the assistance of the opinion of the members of the Supreme Court: and as a general rule the Board will not be prepared in such cases to entertain claims for relief which have never been formulated in the Dominion Court. In no event, therefore, would they have acceded to the request for such a declaration as mentioned above. It does appear that the question of severability was raised in the factums of the Dominion and Ontario, and their Lordships were told, and of course accept the statement, that this point was mentioned to the Supreme Court. It cannot, they think, have been emphasized, for the very careful judgment of the Court makes no mention of it. There appear to be two answers. In the first place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither s. 9 nor Part II. can be contemplated as existing independently of the provisions as to the creation of a Board and the regulation of products. There are no separate and independent enactments to which s. 26 could give a real existence. In the second place, both the Dominion and British Columbia in their Cases filed on

1937 A.C. p. 389.

this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this is true: and that as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it. This relieves them from the task of deciding whether they would have been justified, when dealing with constitutional issues of this importance, in giving effect to arguments inconsistent with the reasons formally put before the Board in the filed Cases of the respective parties.

The Board were given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation: and their attention was called to the existence of Provincial legislation setting up Provincial schemes for various Provincial products. It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other. In the present case their Lordships are unable to support the Dominion legislation as it stands. They will therefore humbly advise His Majesty that this appeal should be dismissed.

1937 A.C. p. 390.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for Quebec: *Lawrence Jones & Co.*

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[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR BRITISH COLUMBIA..... } APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Farmers' creditors—Proposal for composition, extension of time, or scheme of arrangement—Powers of Board of Review—Legislation relating to "bankruptcy and insolvency"—Valid—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (21); s. 92 (13) (16)—Farmers' Creditors Arrangement Act, 1934, St. Can. (24 & 25 Geo. 5, c. 53)—Farmers' Creditors' Arrangement Act Amendment Act, 1935, St. Can. (25 & 26 Geo. 5, c. 20).

By the Farmers' Creditors Arrangement Act, 1934, of the Parliament of Canada, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, a procedure was provided whereby (inter alia) a farmer who was unable to meet his liabilities as they became due might make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal was not accepted by the creditors the matter was referred to a Board of Review to formulate a proposal. If the creditors or the debtor declined to approve the Board's proposal the Board might nevertheless confirm it, and it was thereupon binding on the creditors and the debtor:—

Held, that the Act was genuine legislation relating to "bankruptcy and insolvency" and was accordingly intra vires of the Dominion Parliament under s. 91, head 21, of the British North America Act, 1867.

The statutory conditions of insolvency which enabled a creditor or a debtor to invoke the aid of the bankruptcy laws, or the classes to which those laws applied, were not intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regarded those matters.

Legislative provisions as to compositions, by which bankruptcy was avoided, but which assumed insolvency, were properly within the sphere of bankruptcy legislation.

In re Companies' Creditors Arrangement Act [1934] Can. S.C.R. 659 referred to.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 384 affirmed.

1937 A.C. p. 392.

APPEAL (No. 104 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 18, 1935: "Is the Farmers' Creditors Arrangement Act, 1934,

* *Present:*—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The Act provides a procedure whereby a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor. The relevant sections of the Act are set out in the judgment of the Judicial Committee.

In the Supreme Court of Canada, Duff C.J., Rinfret, Crocket, Davis and Kerwin JJ. were of opinion that the Statute was intra vires: Cannon J. was of opinion that it was ultra vires, except s. 17, which he held was intra vires. The judgments of the Supreme Court are reported at [1936] Can. S.C.R. 384.

1936. Nov. 26, 27. *J. W. de B. Farris K.C.* and *Wilfrid Barton* for the Attorney-General for British Columbia. The effect of the Act has been upheld as bankruptcy legislation coming under head 21 of s. 91 of the British North America Act, 1867—"Bankruptcy and Insolvency." The submission of all the Provinces is the same, namely, that the Act is not in its pith and substance bankruptcy, but is colourable legislation. If it is bankruptcy legislation, then it involves the right to interfere incidentally with property and civil rights in the Province. If, on the other hand, it is not bankruptcy legislation as such, but is only colourable, then the matter undoubtedly comes within property and civil rights in the Province. The fundamental characteristic of bankruptcy and insolvency legislation is that it is designed in the interests of creditors as a class. It is to provide for the rateable distribution of the assets of the debtor among his creditors whether or not the debtor is willing. The

1937 A.C. p. 393.

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present Act, on the contrary, has none of the characteristics of bankruptcy and insolvency legislation for the following reasons: *(a)* It is designed for the purpose of keeping the farmer on his farm, and not to distribute his assets. *(b)* It is not bankruptcy but the prevention of bankruptcy. *(c)* The proceedings of the Act are not in course of bankruptcy proceedings, but before such proceedings. *(d)* An act of bankruptcy is not the basis of the proceedings, but follows only thereafter in case of a failure to carry out a compromise under the Act. *(e)* The proposal of "compromise" so-called is not an ancillary of bankruptcy proceedings, but antecedent to and independent thereof. *(f)* The essential proposal for a compromise is in its features not a voluntary arrangement but a compulsory arrangement imposed by a Board on the creditors. *(g)* Such a scheme is made with a view not of the creditors' welfare as a class, or to distribution among them. It is made to defeat distribution. It may be without regard to their interests and solely in the interests of the debtor and with a view to protecting the value of the farm. *(h)* The scheme is not for the protection of the creditors, but at their expense. *(i)* It deals not with the assets of the debtor for the benefit of the creditors, but with the assets of the creditors for the benefit of the debtor. *(j)* The references in the Act to the Dominion Bankruptcy Act are colourable and establish no substantial connection between the two enactments. *(k)* The scheme treats a subject-matter which in part in some aspects may be ancillary to bankruptcy and insolvency legislation as itself the principal or primary subject-matter of legislation. *(l)* It has no general relation to bankruptcy and insolvency but is special legislation rleative to farmers, and is or may be restricted to certain Provinces. [Reference was made to the relevant provisions of the Dominion Bankruptcy Act, R.S.C. 1927, c. 11, and to the Act under consideration.] The Act sets up a new scheme which in its purpose is not to administer the farmer's property as the assets of his creditors, but to administer it in defiance of that. [Reference was made to *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1); *Croft* v. *Dunphy* (2); *Royal Bank of Canada* v. *Larue* (3); *L'Union St. Jacques de Mont-*

1937 A.C. p. 394.

(1) [1897] A.C. 231, 236. (2) [1933] A.C. 156.
(3) [1928] A.C. 187, 196.

real v. *Bélisle* (1); and *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada.* (2)] If those authorities, which show that in all schemes of bankruptcy the basis of the scheme is the distribution of the assets of the debtor among the creditors, are sound, the present Act came in as an independent Act with its own recital for the purpose not to distribute the assets among creditors, but to prevent that in order to promote production in Canada by moneys taken from the secured creditors and given for the benefit of the farmer. [Reference was also made to *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (3); *Attorney-General for Alberta* v. *Attorney-General for Canada* (4); and *Cushing* v. *Dupuy.* (5)] It is the pith and substance of the Act which must be looked at in testing what it purports to do. In *Attorney-General for Ontario* v. *Reciprocal Insurers* (6) it was said that a Statute must be judged by its natural and reasonable effect: In *City of Halifax* v. *Fairbanks' Estate* (7) "it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity." The Dominion of Canada does not acquire jurisdiction in regard to property and civil rights of the farmers merely because they are unable to pay their obligations as they arise: the Dominion can only deal with the farmer in that connection in the limited field of bankruptcy. It is not claimed that legislation must conform to what was bankruptcy at federation: it is not contended that matters not strictly bankruptcy legislation may not be included as ancillary or necessarily incidental. Legislation which is the antithesis of bankruptcy, however, such as the present, cannot be ancillary, and still remains within the field of the Province. There is no severable clause in the Act and the legislation is bad in toto. [Reference was made to *In re Silver Brothers, Ld.* (8), and *Brooks-Bidlake and Whittall, Ld.* v. *Attorney-General for British Columbia.* (9)]

1937 A.C. p. 395.

Wilfrid Barton followed. The passages at p. 471 of Blackstone's Commentaries, vol. II., c. 31, dealing with

(1) (1874) L.R. 6 P.C. 31, 36.
(2) [1894] A.C. 189.
(3) [1898] A.C. 700, 715.
(4) [1928] A.C. 475, 486.
(5) (1880) 5 App. Cas. 409, 415.
(6) [1924] A.C. 328, 339.
(7) [1928] A.C. 117, 126.
(8) [1932] A.C. 514, 520.
(9) [1923] A.C. 450, 456-7.

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"Bankruptcy," show the acid tests of bankruptcy and insolvency legislation. They are to deliver up the assets and the administration of them for the benefit of the creditors as a body. It does not follow that because there is a form of composition in this Act that that brings it into the sphere of bankruptcy; such forms of composition have existed even before bankruptcy. The pith and substance of this Act is to prevent bankruptcy in the case of a farmer. Then by exempting him from the purview of bankruptcy legislation he is at once put back into the domain of property and civil rights in which the Dominion may not interfere.

I. A. Humphries K.C. for the Attorney-General for Ontario. This legislation is not bankruptcy and insolvency: it may have the appearance of that type of legislation, but it is debt adjustment legislation, and it falls within property and civil rights within the Province. It is not really compromise legislation, but it is, as stated in the recital to the Act, to keep the farmer on the land. [Reference was made to *Ex parte Bischoffsheim. In re Aylmer* (1); *Lucas* v. *Martin* (2); and *in re Webb. Ex parte Board of Trade.* (3)] With regard to the position of secured creditors, the bankruptcy legislation of Canada, which is very much on the same lines as the Imperial Bankruptcy Act of 1914, shows that the preservation of the rights of the secured creditors is contemplated. The present legislation shows that compromises and arrangements and schemes are contemplated and are provided for the purpose of preserving the rights not only of the debtor and the creditors, but for their mutual benefit: *Cushing* v. *Dupuy* (4); *Royal Bank of Canada* v. *Larue* (5); *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (6) A true compromise is an arrangement between parties by which each makes concessions to the other. The most common kind is one in which a creditor diminishes the amount of his security. The Chief Justice in this case said that "it is not open to dispute in this Court that legislation in respect of 'compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law'," and he referred to *In re Companies' Creditors Arrangements Act.* (7) The main element in that

1937 A.C. p. 396.

(1) (1887) 19 Q.B.D. 33.
(2) (1888) 37 Ch. D. 597, 607.
(3) [1914] 3 K.B. 387, 391.
(4) (1880) 5 App. Cas. 409, 415.
(5) [1928] A.C. 187.
(6) [1891] 1 Ch. 213.
(7) [1934] Can. S.C.R. 659.

case is that there is a benefit to be derived for the general body of creditors upon arrangements being made on the consent of the majority properly approved by the Court.

What is the reasonable intent of the Act? What is its pith and substance? What is its aim and object? The Board of Review is the main teeth of the Act, and that Board can really make a new contract, and make a better bargain for the farmer. It is really debt adjustment and confiscatorial legislation dealing with subject-matters which are entirely within the Province—property and civil rights.

R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright and *R. St. Laurent* for the Attorney-General for Canada, were not called upon.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD THANKERTON. This appeal, by special leave, challenges the constitutional validity of the Farmers' Creditors Arrangement Act, 1934, which was enacted by the Dominion Parliament as chapter 53 of the Statutes of Canada, 1934. The following question was referred to the Supreme Court of Canada by the Governor-General in Council on November 18, 1935, namely: "Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?"

1937 A.C. p. 397.

Before the Supreme Court, the argument was presented by counsel on behalf of the Attorney-General for Canada and on behalf of the Attorneys-General for Ontario, Quebec, New Brunswick, British Columbia, Manitoba and Saskatchewan. On June 17, 1936, the judgment of the Supreme Court was delivered, and in the formal order the opinion of the Court is expressed as follows: "The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is *intra vires*; Mr. Justice Cannon is of the opinion that the statute, except s. 17, is *ultra vires* and that s. 17 is *intra vires*."

The Attorney-General for British Columbia now appeals against that judgment, and is supported by the respondent the Attorney-General for Ontario; the Attorney-General for Canada defends the judgment.

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The appellant raises no question as to s. 17 of the Act, which relates to interest, and falls under head 19 of s. 91 of the British North America Act of 1867, but he maintains that the rest of the Act does not truly form legislation relating to "bankruptcy and insolvency," but is an invasion of the sphere of the Provincial Legislatures in relation to "property and civil rights in the Province" or "matters of a merely local or private nature in the Province," which is secured to them by heads 13 and 16 of s. 92 of the British North America Act.

The appellant submitted that the fundamental characteristic of legislation in relation to bankruptcy and insolvency is that it is conceived in the interests of the creditors as a class, and provides for distribution of the debtor's assets among them, and he maintained that the Act here in question is not only lacking in such a characteristic, but is inconsistent therewith, and he gave twelve reasons, which may be compendiously stated as follows: The Act is mainly designed to keep the debtor farmer on the land at the expense of his creditors; it deals with a stage prior to bankruptcy and insolvency, and is designed to prevent bankruptcy by means of a composition which is compulsory on creditors and defeats their interests; it deals with assets belonging to creditors for the benefit of the debtor; the references to bankruptcy are merely ancillary to the main design; and the Act has no general relation to bankruptcy and insolvency, as it refers to farmers only, and may refer to certain Provinces only.

1937 A.C. p. 398.

The long title of the Act of 1934 is "An Act to facilitate compromises and arrangements between farmers and their creditors." The relevant sections of the Act of 1934, as amended by the Act of 1935, may now be referred to. The provisions and rules of the Bankruptcy Act are made applicable by sub-ss. 2 and 3 of s. 2 of the Act, which provide: "(2.) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply mutatis mutandis in the case of proceedings hereunder including meetings of creditors.

(3.) In any case where the affairs of a farmer have been arranged by a proposal approved by the Court or confirmed by the Board as hereinafter provided, Part I. of the *Bankruptcy Act* shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer."

The main provisions of the Act, on which the controversy turns, are contained in ss. 6 to 11, which relate to compositions, and s. 12, under which a Board of Review may be established; these sections provide as follows:—

"COMPOSITIONS.

6.—(1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor

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1937 A.C. p. 400.

or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation.

9. Subsections three and five of section sixteen of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer.

10. Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.

11.—(1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose: Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. [1935, Ch. 20, s. 3, Am.]

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

Provincial Boards of Review.

12.—(1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

(2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.

(3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction in bankruptcy by the *Bankruptcy Act*, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors. In the event of any Commissioner other than the Chief Commissioner being unable to hear and deal with any case for any reason considered sufficient by the remaining Commissioners, then the remaining Commissioners shall name an ad hoc Commissioner to hear and deal with such case with all the powers of the Commissioner whose place he takes. In the event of the Chief Commissioner being unable to hear and deal with any case on the request of the other Commissioners the Minister shall name an ad hoc Chief Commissioner with all the powers of the Chief Commissioner. [1935, Ch. 20, s. 4, Am.]

(4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested.

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. [1935, Ch. 20, s. 5, Am.]

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board: Provided that the Board may direct any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board. [1935, Ch. 20, s. 6, Am.]

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(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

(10) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the *Inquiries Act.*

1937 A.C. p. 402.

(11) Notwithstanding anything contained in the *Bankruptcy Act,* an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors provable as debts under the *Bankruptcy Act* exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtors' affairs can best be administered under the *Bankruptcy Act.* [1935, Ch. 20, s. 7, Am.]"

In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law. In a normal community it is certain that these conditions will require revision from time to time by the Legislature; as also the classes in the community to which the bankruptcy laws are to apply may require reconsideration from time to time. Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters.

1937 A.C. p. 403.

Further, it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation. *(In re Companies' Creditors Arrangement Act.* (1))

It will be seen from the sections above quoted that the Act here in question relates only to a farmer who is unable to meet his liabilities as they become due, and enables him to make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made, for which a precedent existed in the Canadian Bankruptcy Act of 1919. As defined in s. 2, an assignment means an assignment made under the Bankruptcy Act by a farmer. If the creditors fail to approve of the farmer's proposal, the Board of Review, on the written request of a creditor or the debtor, is to endeavour to formulate "an acceptable proposal" for submission to the creditors and the debtor; if the creditors or the debtor decline to approve the Board's proposal, the Board may nevertheless confirm their proposal, and it is to bind the creditors and the debtor.

Subject to the contention by the appellant, now to be dealt with, their Lordships are of opinion that these provisions fall within head 21 of s. 91 of the British North America Act.

The appellant maintains that the real object of these provisions is to keep the farmers on the land for the benefit of agricultural production, and that this object is to be attained by the operations of the Board of Review, who have power to sacrifice the interests of the creditors for the benefit of the debtor farmer; he further maintains that under s. 7 the secured creditor may be deprived of that which is his property. To deal first with the last contention, their Lordships are clearly of opinion that s. 7 does not enable any creditor to be deprived of his security, but does enable the proposal for composition to provide for the reduction of the debt itself, or an extension of time for its payment, which is a familiar feature of compositions.

1937 A.C. p. 404.

The appellant laid stress on the provisions of sub-s. 8 of s. 12, but that does not appear to their Lordships to be an illegitimate or unusual element to be taken into account in the consideration of composition schemes, and, indeed, the

(1) [1934] Can. S.C.R. 659.

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retention of the business under the management of the debtor may well be a consideration in the interests of the creditors as well as of the debtor. Its fair application appears to be well secured by the provisions of sub-ss. 3, 4 and 9. A judicial Chief Commissioner is provided for under sub-s. 3; under sub-s. 4 the Board's proposal is to be designed as an acceptable one to both parties, and this element is emphasized by sub-s. 9. Their Lordships are unable to accept the contention that the Act is not genuine legislation relating to bankruptcy and insolvency.

Accordingly, the appeal fails, and their Lordships will humbly advise His Majesty that the appeal should be dismissed, without costs, and that the opinion of the majority of the Supreme Court should be affirmed.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorney-General for Ontario: *Blake & Redden.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR ONTARIO ..... } APPELLANT;

Jan. 28.

1937 A.C. p. 405.

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS ..... } RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Suppression of detrimental trade practices—National trade mark—Civil right of novel character—Valid legislation—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (2); s. 92 (14)—Dominion Trade and Industry Commission Act, 1935, St. Can. (25 & 26 Geo. 5, c. 59), s. 2 (h); s. 15, sub-s. 2, to s. 26.

Sect. 15, sub-s. 2; ss. 16, 17, and 23 to 26 inclusive, of the Dominion Trade and Industry Commission Act, 1935, of the Parliament of Canada, which was passed for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads, were intra vires of the Dominion Parliament. Sects. 20, 21 and 22 of the Act, so far as they were applicable to such of the enactments, or to offences created by such of the enactments enumerated in s. 2 *(h)* of the Act as might be intra vires were not ultra vires.

Sect. 18 of the Act, which provided that the words "Canada Standard" or the initials "C.S." should be a national trade mark, vested in His Majesty in right of the Dominion, and that the application of that national trade mark to any commodity warranted it to conform to the relevant Dominion commodity standard, and s. 19, by which any producer or manufacturer or merchant was given permission to apply the national trade mark to any commodity provided it conformed to the appropriate statutory specification, were intra vires of the Dominion Parliament under head 2 of s. 91 of the British North America Act, 1867, "the regulation of trade and commerce." The substance of that legislation was to define a national mark, and to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. The method adopted in s. 18 was to create a civil right of a novel character, but there seemed to be no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields if they could be brought fairly within the classes of subjects confided to Parliament by the constitution.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 379 varied.

APPEAL (No. 105 of 1936) and cross-appeal, by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, 1937 A.C. p. 406.

* *Present:*—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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dated November 5, 1935: "Is the Dominion Trade and Industry Commission Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The effect of the relevant sections of the Act, which was passed for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads, which had found that there were prevalent throughout Canada trade practices which were deemed to be detrimental to the interest of the public and which should be suppressed, was as follows:—

"Sect. 2. In this Act unless the context otherwise requires: (*h*) 'Laws prohibiting unfair trade practices' means the provisions of the Agricultural Pests Control Act, The Canada Grain Act, the Combines Investigation Act, the Dairy Industry Act, the Electrical Units Act, The Electricity Inspection Act, 1928, the Feeding Stuffs Act, the Fertilizer Act, the Fish Inspection Act, the Food and Drugs Act, The Fruit, Vegetables and Honey Act, the Gas Inspection Act, the Inspection and Sale Act, the Live Stock and Live Stock Products Act, The Maple Sugar Industry Act, 1930, the Meat and Canned Foods Act, The Natural Products Marketing Act, 1934, The Patent Act, 1935, the Petroleum and Naphtha Inspection Act, The Precious Metals Marketing Act, 1928, the Proprietary or Patent Medicine Act, the Seeds Act, the Trade Mark and Design Act, The Unfair Competition Act, 1932, the Water Meters Inspection Act, the Weights and Measures Act, and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the Criminal Code, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest;"

Sect. 3 establishes a Dominion Trade and Industry Commission of three persons.

1937 A.C. p. 407.

Sect. 13 charges the Commission with the administration of the Combines Investigation Act (the constitutional validity of which had been unsuccessfully challenged in *The Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (1))

(1) [1931] A.C. 310.

Sect. 14 empowers the Commission, after investigation, to recommend to the Governor-in-Council for approval agreements between persons in a specific industry, in which there is wasteful or demoralising competition, for controlling and regulating prices. The interests of trade and the public are protected. The Commission is bound to require persons engaged in the industry to furnish full information relating to operations within the industry under the agreements, and may recommend that approval of an agreement be withdrawn. The parties to an approved agreement are protected from prosecution without the consent of the Commission.

Sect. 15 charges the Commission with responsibility for recommending prosecutions for offences relating to commodity standards, and authorizes the Attorney-General for Canada to require the Director of Public Prosecutions (an official appointed under ss. 21 and 22 of the Act) to institute proceedings for the punishment of any such offence. The section also authorizes the Commission to study, investigate, report and advise on questions relating to commodity standards, grading and the protection of consumers, and to report on the desirability of establishing commodity standards and grades for any commodity.

Sects. 16 and 17 require the National Research Council, at the Commission's request, to aid the Commission in specified ways.

Sect. 18 makes "Canada Standard" or "C.S." a national trade mark, vested in His Majesty in right of the Dominion, the application of which to any commodity warrants it to conform to the relevant Dominion commodity standard.

Sect. 19 authorizes any producer, manufacturer, dealer or merchant to apply the trade mark to any commodity in accordance with regulations made by the Commission, provided that the commodity conforms to the relevant standard and that (subject to a dispensing power in the Commission in respect of specific commodities) any grade designation established by Dominion legislation for such commodity is conspicuously applied in accordance with the Commission's regulations.

1937 A.C. p. 408.

Sect. 20 requires the Commission to receive and investigate complaints of unfair trade practices, with power before or after an investigation to recommend prosecution. The

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Attorney-General for Canada, if he concurs, may send the recommendation to the Director of Public Prosecutions or to the Attorney-General for the Province in which the offence is alleged to have been committed.

Sects. 21 and 22 provide for the appointment of a Director of Public Prosecutions to prosecute at the instance of the Attorney-General for Canada in important or difficult cases of unfair trade practices prohibited by law, to advise or assist provincial Attorneys-General in connection with the prosecution for such practices, and to assist the Commission in investigating allegations or complaints of such practices, committed or contemplated.

Sect. 23 empowers the Commission to invite persons engaged in any industry to a conference on practices in the industry to determine what practices are unfair and undesirable, and to make public the general opinion of the conference, or the opinion of the Commission, on any trade practice considered unfair or undesirable.

Sect. 24 empowers the Commission to co-operate with any board of trade or chamber of commerce in any commercial arbitration conducted by or under the authority of such board or chamber.

Sect. 25 obliges the Commission, when required by the Governor-in-Council, to study, investigate, report and advise on questions relating to the general trend of social or economic conditions or to any social or economic problem of Canada; and to co-operate with the Economic Council in any economic investigation.

Sect. 26 applies the Inquiries Act, the Combines Investigation Act and the Tariff Act to inquiries and investigations under the Act, and gives the Commission the powers of a commission under the Inquiries Act.

1937 A.C. p. 409.

The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.), whose answer was expressed to be directed only to those sections of the Act upon which they had had the benefit of argument, held that ss. 14, 18 and 19 were ultra vires; that ss. 16 and 17 were not ultra vires; and that ss. 20, 21 and 22 so far as they were applicable to such of the enactments, or to offences created by such of the enactments enumerated in s. 2 (*h*) as might be intra vires were not ultra vires. The judgment of the Supreme Court is reported at [1936] Can. S.C.R. 379.

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The Dominion cross-appealed in respect of ss. 18 and 19, but there was no appeal or cross-appeal against the finding that s. 14 was ultra vires.

1936. Nov. 12, 13. *A. W. Roebuck K.C.*, A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Sect. 20, dealing with "Unfair Trade Practices," is appealed against by Ontario. The first part of the section was upheld so far as s. 2 (*h*) is intra vires. There is no definition of unfair trade practices; they are not confined to what is criminal. There is a distinction between a Parliamentary Committee investigating conditions within the Dominion for the purposes of supplying Parliament with information and the appointing of a Commission for the purpose of interfering with civil rights in the Province. The Commission's right to investigate is, however, conceded, because the decision in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1) is conclusive. This Act provides for an inquiry into civil rights, as opposed to the Combines Investigation Act, R.S.C., 1927, c. 26: the *Proprietary Articles Trade Association* case. (1) The only ground of objection is that it permits an investigation into these practices which are property and civil rights in the Province. The last sentence of s. 20 goes with the next argument on ss. 21 and 22. The real objection is in respect of s. 22 (*a*): that sub-section is an invasion of the provisions of s. 92, head 15, of the British North America Act, 1867, which reserves to the Province the administration of justice. In this legislation there is a constant stepping forward, an encroachment which alarms the Provincial authorities. Sect. 23, "Fair Trade Conferences," is opposed. It is submitted that that involves the review of agreements, a criticism of contracts, and a criticism and determination as to the desirability and fairness of a great many trade practices which are thought by some to be undesirable. *Citizens Insurance Company of Canada* v. *Parsons* (2) puts the review of agreements and contracts in the hands of the Provinces with a view to controlling industry. Looked at from the standpoint of an inquiry into the persons engaged in industry the enquiry in this Act invades their civil rights: looked at from the standpoint of the general public, it deals with matters purely local within the Province. Further,

1937 A.C. p. 410.

(1) [1931] A.C. 310.

(2) (1881) 7 App. Cas. 96.

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s. 23 is simply a permissive one in that the Commission may invite representative persons engaged in industry to a conference to consider commercial practices that prevail in any such industry, and determine what practices are unfair or undesirable in the interest of the industry, and of any person engaged in such industry, and of the general public. This again gives to a Dominion appointed Commission power, when such a Conference is held, to determine what practices are unfair or undesirable. This is not "regulation of trade and commerce" under s. 91 (2) of the British North American Act. It is dealing with property and civil rights within the Province, and on a review of agreements, contracts, practices, etc., of any one engaged in a particular industry, to say what is unfair. In so far, therefore, such section is ultra vires of the power of Parliament.

Sect. 25 sets up a Commission to inquire into the social and economic conditions in the Provinces: contracts and agreements might come under that: *Parsons'* case (1); and prices and commodities: the *Proprietary Articles Trade Association* case (2); and wages, hours and conditions of labour: *In re Legislative Jurisdiction over Hours of Labour* (3)—it was held in that case that the control of hours of labour of working people was within the domain of the Province. As to s. 26, if the words had been "to study and advise" there would have been no objection, but the Commission is to investigate, and that is wide enough to include investigation into property and civil rights. There is no objection to a Parliamentary Committee, but to have a standing Board for the purpose of reviewing contracts in the Province is undesirable. Sect. 27 gives a plain express right to regulate or to interfere in the regulation of prices, production and agreements. Sects. 20, 23, 25, 26 and 27 of the Act are ultra vires.

1937 A.C. p. 411.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick. Complaint is now made by New Brunswick of s. 15; s. 17, sub-s. 3; and ss. 20, 21, 22, 23 and 27. On the question of inquiries and the right to inquire, it is submitted that a power to investigate, whether it gives a permissive power to investigate or compels the body set up to investigate,

(1) (1881) 7 App. Cas. 96. (2) [1931] A.C. 310.
(3) [1925] Can. S.C.R. 505.

is only a matter on which the Dominion can pass an Act if it is in relation to matters in respect of which the Dominion can pass legislation. The exclusive power to investigate any matters which can only be dealt with by the Legislatures of the Provinces, in so far as investigation depends upon the authority of an Act of Parliament, is within the exclusive sphere of the Provincial Legislature and not with the Dominion sphere: *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1); *Lymburn* v. *Mayland.* (2) Sect. 15, along with ss. 21 and 22, is impeached as being an interference with the administration of justice. If it is intended to invade the duties of the Provincial Attorneys-General under s. 92 of the British North America Act, or to consider whether he is properly performing those duties, the legislation is objectionable. The only point on s. 17, sub-s. 3, is that it appears to deal with a question of civil rights in the Province. The objection to s. 20 is that there appears to be nothing in the Act which relates these powers, and certainly nothing which restricts these powers, to matters which are within Dominion competence. With regard to s. 22 (*a*), that it shall be the duty of the Director of Public Prosecutions under the superintendence of the Minister of Justice to institute criminal proceedings, the objection there depends on whether "the refusal or failure of any other person" includes the Provincial Attorney-General. The objection is on the ground that the subsection seems to set the Director of Public Prosecutions as an official to decide whether or not the Provincial Attorney-General is properly carrying out his duties, and that it creates a state of conflict which could not have been the intention of the British North America Act. Sect. 23, which deals with "Fair Trade Conferences," enables the Commission under Dominion legislation to consider civil rights and matters merely local without any relation to the question whether they come within any head of Dominion jurisdiction, and the section is an encroachment on Provincial jurisdiction. Sects. 24, 25 and 26, in so far as they provide for investigation by the Commission, are subsidiary sections which should fall within the sections held to be invalid, and they are independently open to objection as

1937 A.C. p. 412.

(1) [1922] 1 A.C. 191, 199.

(2) [1932] A.C. 318, 325.

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purporting to give the Commission such wide powers of investigation as to interfere seriously with the property and civil rights of persons and corporations in the Provinces.

R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright and *R. St. Laurent*, for the Attorney-General for Canada. Sect. 15—Commodity Standards—the first portion, and ss. 21 and 22 (*a*) are justified, among other reasons, by the language in the *Proprietary Articles Trade Association* case. (1) All that flows from the proper construction of the first part of s. 15 and from s. 22 (*a*) is that proper action should be taken to institute the proceedings in the manner in which it is proper that proceedings may be instituted, and even if the language may be susceptible of a construction which would take it beyond that, in dealing with like language in other cases this Board has laid down the rule that the construction under which it may be competent is the one which would be adopted: *Attorney-General for Ontario* v. *Reciprocal Insurers*. (2) It does not mean forcing upon the Attorney-General for the Province any advice he may be reluctant to accept. As to s. 17, sub-s. 3, it is certainly within the province of the Dominion Parliament to prescribe the duties of the officers of the public service of Canada: *O'Connor* v. *Waldron* (3); *Attorney-General for Ontario* v. *Attorney-General for Canada*. (4) Sect. 22 (*c*) would be merely ancillary to s. 20. With regard to "Fair Trade Conferences" in s. 23, the conferences are merely conferences, no one can be compelled to attend, no one can be compelled to give evidence or produce documents. This is enabling legislation permitting the Commission to do this. Nobody objects to s. 24. As to s. 25—"Economic investigation"—the power to investigate is a proper and necessary power. It is conceivable that persons entrusted with that power might attempt to exercise it beyond what would be a proper exercise of it, and in two Canadian cases where attempts were made to obtain injunctions to prevent such investigations the Court said that they would not presume that the Commission would go beyond its powers, and that if it did attempt to do so it could be restrained at that time. [In contrasting the Australian and

1937 A.C. p. 413.

(1) [1931] A.C. 310.
(2) [1924] 328, 344.
(3) [1935] A.C. 76.
(4) [1912] A.C. 571, 588-9.

the Canadian constitutions reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (1)] The onus is upon anyone challenging the validity of this legislation to show that it is an encroachment on the Provincial legislative powers. The holding of s. 25 intra vires does not imply that there might not be tasks set to the Commission which would be outside the scope of the section. There is undoubtedly a field within which this section could operate, and it is fair to assume that the Governor-General in Council would not attempt to authorize investigations outside the field of knowledge that is pertinent to the Government of Canada in the proper discharge of its duties. Sect. 26 is the enabling section: it is contended that the Commission, when properly authorized under the Act to conduct an investigation, shall have the power provided by s. 26 to make that investigation effective.

Sects. 18 and 19, which are the objects of the cross-appeal, provide for a Canada Standard and make it an offence to use that standard otherwise than as provided in the sections. Those sections are enactments in relation to the regulation of trade and commerce. They relate also to the protection of industrial property as defined in the International Convention in that behalf signed at The Hague on November 1, 1925 (Canadian ratification deposited May 1, 1928). The sections also relate to the criminal law; and at the time of confederation the regulation and protection of trade marks was dealt with in statutes relating to the criminal law. Further, ss. 18 and 19 relate to a matter of international, as well as national, concern and are, therefore, enactments in relation to the peace, order and good government of Canada within the scope of the residuary power of the Parliament of Canada. The subject-matter of ss. 18 and 19 transcends Provincial legislative authority. [Reference was made to the *Proprietary Articles Trade Association* case (2); *the Board of Commerce Act* case (3); and *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction.* (4)] The Produce Marketing Act of British Columbia was held to be invalid Provincial legislation as dealing with a matter of trade and commerce which was of more than Provincial concern.

1937 A.C. p. 414.

(1) [1914] A.C. 237, 252.
(2) [1931] A.C. 310.
(3) [1922] 1 A.C. 191, 198.
(4) [1931] Can. S.C.R. 357, 364.

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There must be cases which would require both Federal and Provincial action in order to be dealt with completely. Sects. 18 and 19 declare what the Canada Standard is intended to represent, and penalise whosoever offers a commodity so marked if it is fraudulently marked: all that could have been done in a prohibitive form by proper sections in the Criminal Code. If Parliament decides that a harmful practice should be suppressed in the public interest, it is proper criminal law. This is something which is really outside any of the heads of s. 92 of the British North America Act. Quebec could set up a Quebec standard for intra-State trade: this in no way restricts the rights of the Provinces. There is no invasion of any exclusive field of Provincial jurisdiction.

Roebuck K.C. replied. The combined effect of the judgment in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (1) is that an Act of a general character permitting the Commission to ask all sorts of questions, some of which might be inside and some outside of the constitutional rights of the Australian Commonwealth, was ultra vires of the Commonwealth. That is almost on all fours with the present legislation—an Act permitting an investigation into social and economic conditions which may or may not be within Dominion jurisdiction, and which, on the other hand, may or may not be within Provincial jurisdiction, is ultra vires of the Dominion Legislature. With regard to the cross-appeal, the legislation appears to be harmless and in the public interest.

1937 A.C. p. 415.

Gahan, in reply, and dealing with the cross-appeal: The position of the Attorney-General for New Brunswick is not directed so much to the particular effect of these two sections, 18 and 19, as to the ground on which the Dominion seeks to justify them.

[Reference was also made to *Citizens Insurance Company of Canada* v. *Parsons* (2); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3); *John Deere Plow Co.* v. *Wharton* (4); *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (5);

(1) [1914] A.C. 237, 257.
(2) 7 App. Cas. 96, 111.
(3) [1896] A.C. 348, 362.
(4) [1915] A.C. 330, 340.
(5) [1922] 1 A.C. 191, 198, 201.

Attorney-General for British Columbia v. *Attorney-General for Canada* (1); and *Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (2)]

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1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal and cross-appeal from a judgment of the Supreme Court on a reference by the Governor-General in Council, dated November 5, 1935, asking whether The Dominion Trade and Industry Commission Act was ultra vires of the Parliament of Canada. The unanimous answer of the Supreme Court, which was expressed to be directed only to those sections of the Act upon which they had the benefit of argument, was that ss. 14, 18, and 19 were ultra vires, that ss. 16 and 17 were not ultra vires: and that ss. 20, 21 and 22 so far as they were applicable to such of the enactments, or to offences created by such of the enactments, enumerated in s. 2 (*h*) as might be intra vires were not ultra vires. The Board were invited in argument to deal with ss. 23-26 inclusive, which are not referred to in the judgment of the Supreme Court, presumably because no argument upon them was addressed to the Court. Except on one point—namely, as to the validity of ss. 18 and 19, their Lordships agree with the judgment of the Supreme Court and the reasons given by the Chief Justice, with which the other learned judges concurred. Sect. 15, sub-s. 2; ss. 16, 17 and 20 appear to be legitimate provisions for ascertaining whether criminal acts have been committed. Sect. 22 (*a*) was said to take out of the control of the Law Officers of the Province the conduct of the criminal proceedings referred to in the section. If so, it was said to encroach upon s. 92 (14): the Administration of Justice in the Province. A similar objection was made to the latter part of s. 20. The answer in respect of both sections is that the contention is based upon a construction of the section which the words do not bear. Nothing in the section gives either the Attorney-General for Canada, or the Director of Public Prosecutions any authority other than to commence proceedings in accordance with the law of the Province, and thereafter to give such assistance to the authorities of the Province as is within the existing rights of persons in such case, and as may be acceptable to the authorities. Sects. 23 to 26 appear to define the power of the Commission, and to give

(1) [1924] A.C. 222. (2) [1931] A.C. 310, 326.

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them no rights of interfering with rights or property in the Province, except possibly powers under s. 26 which are of like validity with the powers given by the valid Dominion Acts there referred to.

The only remaining question is as to the validity of ss. 18 and 19, which is the subject-matter of the cross-appeal, and in this matter only their Lordships find themselves in disagreement with the judgment of the Supreme Court. Sect. 18, sub-s. 1, provides that "the words 'Canada Standard' or the initials 'C.S.' shall be a national trade-mark and the exclusive property in and the right to the use of such trade-mark is thereby declared to be vested in His Majesty in the right of the Dominion. . . ." By sub-s. 2 such national trade mark as applied to any commodity pursuant to the provisions of that Act or any other Act of the Parliament of Canada is to constitute a representation that such commodity conforms to the requirements of a specification of a commodity standard established under the provisions of any Dominion Act. By s. 19, sub-s. 1, any producer, or manufacturer or merchant is given permission to apply the national trade mark to any commodity provided it conforms to the appropriate statutory specification, and by sub-s. 2 it is made an offence to apply the mark to any commodity in violation of the prescribed conditions.

There exists in Canada a well established code relating to trade marks created by Dominion statutes, to be found now in the Trade Marks and Designs Act, R.S.C., 1927, c. 201, amended by S.C., 1928, c. 10. It gives to the proprietor of a registered trade mark the exclusive right to use the trade mark to designate articles manufactured or sold by him. It creates, therefore, a form of property in each Province and the rights that flow therefrom. No one has challenged the competence of the Dominion to pass such legislation. If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91 (2), the Regulation of trade and commerce, referred to by the Chief Justice. There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks. But if the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual

feature of national and international commerce—a national mark. It is perfectly true, as is said by the Chief Justice, that the method adopted in s. 18 is to create a civil right of a novel character. Ordinarily, a trade mark gives rights only when used in connection with goods manufactured or sold by the person who has the right to use the mark. A trade mark "in gross" would be an anomaly. And it obviously is not contemplated that the Crown should have any proprietary interest in the goods to which the mark vested in the Crown is to be applied. But there seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields, if they can be brought fairly within the classes of subjects confided to Parliament by the constitution. The substance of the legislation in question is to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. To vest the "exclusive property" in the mark in His Majesty is probably no more than to vest "the use of" the mark in His Majesty. It may afford a useful civil protection for the mark when it is violated in Canada by persons who have not violated the somewhat restricted prohibition of the penal sub-section (which only applies to persons who "apply" the mark to commodities), or violated abroad, where the penal provisions of the law of Canada could not be applied at all. It may be noticed that s. 53 of the Trade Marks and Designs Act, R.S.C., 1927, c. 201, appears to afford protection in Canada to trade marks owned by foreign associations though held by them "in gross." For the reasons above given the legislation appears to their Lordships to be within the competence of the Dominion Parliament. No appeal was directed to the Board as to the answer to s. 14. Their Lordships therefore will humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that the answers be varied as to ss. 18 and 19 by stating that the sections are not ultra vires, and by adding that as to ss. 23 to 26 inclusive these sections are not ultra vires.

Solicitors for the Attorney-General for Ontario and for the Attorney-General for New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

TORONTO CORPORATION.....Appellants;

AND

YORK CORPORATION.....Respondents.

ATTORNEY-GENERAL FOR ONTARIO AND ANOTHER.....} Interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Ontario Municipal Board—Primarily an administrative body—Not validly constituted to receive judicial authority—Severability—Powers of examination, inspection and discovery of documents—Ontario Municipal Board Act, 1932 (22 Geo. 5, c. 27), ss. 41-46, 54, 59—Township of York Act, 1936 (1 Edw. 8, c. 88), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 96, 99, 100.

In 1916 the respondent corporation entered into an agreement with the appellant corporation whereby the latter agreed to supply water to the respondents on terms including payment at the rate of 20 cents per 1000 gallons. In 1936, on an application by the respondents to the Ontario Municipal Board to vary the rate for water supplied, made pursuant to s. 2 of the Township of York Act, 1936, which provided (inter alia) that notwithstanding the provisions of the agreement of 1916 the Municipal Board should have jurisdiction to vary and fix the rates, and to hear and determine any such application, the Municipal Board made an order directing the appellants to make discovery on oath of documents, authorizing the respondents to enter upon and inspect the appellants' waterworks system, and directing the appellants' Commissioner of Works to submit to be examined upon oath. The appellants having alleged that the Ontario Municipal Board was invalidly constituted to make such an order:—

Held, that the Ontario Municipal Board is primarily, in pith and substance, an administrative body. The members of the Municipal Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of judges of Superior, District and County Courts, the Board is not validly constituted to receive judicial authority. Assuming that the Ontario Municipal Board Act, 1932, which set up the Board,
1938 A.C. p. 416. does by some of its sections purport to constitute the Board a Court of Justice analogous to a Superior, District or County Court, it is to that extent invalid. There is, however, nothing to suggest that the Board would not have been granted its administrative powers without the addition of the alleged judicial powers and although, therefore, such parts of the Act of 1932 as purport to vest in the Board the functions of a Court have no effect, they are severable, and the Board is validly constituted for the performance of its administrative functions.

The Municipal Board's powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a Court of Justice, are not inconsistent with the powers of an administrative body whose duty it is to ascertain the facts with which they are dealing.

* *Present:*—Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, and Lord Maugham.

Further, assuming that the first part of s. 2 of the Township of York Act, 1936, purported to confer a judicial function on the Board, it was inoperative, but the second part related to an administrative function—the varying and fixing of the rate—and was severable. The order made by the Ontario Municipal Board was accordingly valid.

Proprietary Articles Trade Association v. *Attorney-General for Canada* [1931] A.C. 310, and *O'Connor* v. *Waldron* [1935] A.C. 76, referred to.

Judgment of the Court of Appeal for Ontario [1937] O.R. 177, affirmed.

APPEAL (No. 37 of 1937), by special leave, from a judgment of the Court of Appeal for Ontario (December 4, 1936), dismissing an appeal from an order of the Ontario Municipal Board (September 23, 1936).

In 1916 the respondents, the Corporation of the Township of York, entered into an agreement with the appellants, the City of Toronto Corporation, whereby the appellants agreed to supply water to the respondents on terms, including payment at the rate of 20 cents per 1000 gallons. The agreement, which contained a provision that the rate might be altered by agreement or by arbitration, was confirmed by an Act of the Ontario Legislature, 1917 (7 Geo. 5, c. 98). In 1936, that Legislature passed the Township of York Act (1 Edw. 8, c. 88), which by s. 2 provided that notwithstanding the provisions of the agreement of 1916, "either party to the said agreement may from time "to time apply to the Ontario Municipal Board to vary "the rates to be charged for water supplied by the said "City Corporation under the terms of the said agreement "or to settle any differences arising between the parties "to the said agreement as to the construction thereof, "or as to any matters relating to or arising out of the agree-"ment, and the Ontario Municipal Board shall have "jurisdiction to vary and fix the said rates, and to hear "and determine any such application, and the decision of "the said Board on any such application shall be final and "conclusive and shall not be subject to appeal."

1938 A.C. p. 417.

An application was made by the respondent to the Municipal Board in pursuance of that Act to vary the rate for water supplied, and it was in respect of that application that the Municipal Board made the order now complained of, ordering the appellants to make discovery on oath of documents, authorizing the respondents to enter upon and inspect the appellants' waterworks system, and directing

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the appellants' Commissioner of Works to submit to be examined upon oath touching his knowledge of the matters in question.

In answer to the application the appellants pleaded (inter alia) that s. 2 of the Township of York Act, 1936, was ultra vires the Legislature of Ontario, and that the Ontario Municipal Board had no jurisdiction to hear the application or to vary the rates, and that the members of the Municipal Board had no jurisdiction to make and enforce the order, not having been appointed by the Governor-General in accordance with the provisions of s. 96 of the British North America Act, 1867.

The Court of Appeal for Ontario (Rowell, C.J.O., Riddell, Middleton, Fisher and Henderson JJ.A.) held that the order was valid, though they were also of opinion that the Act conferring jurisdiction was in part ultra vires as an attempt to confer judicial powers on the Municipal Board, but that such part was severable from that part which related to an administrative function—the power to vary and fix the rates. The appeal is reported at [1937] O.R. 177.

1937. Nov. 26, 29, 30; Dec. 2. *W. N. Tilley K.C.* and *C. M. Colquhoun K.C.* (both of the Ontario Bar) for the appellant corporation. This appeal raises questions as to the jurisdiction of commissions appointed to do mainly administrative acts, but having coupled with those powers exceptionally broad powers of a judicial character. In 1906 the Ontario Legislature set up the Ontario Railway and Municipal Board, the predecessor of the present Ontario Municipal Board, and the question has frequently arisen in Ontario whether all the powers entrusted to the former Board could be exercised by members appointed by the Provincial Legislature, or whether it was necessary that, to exercise some of the powers, they should be Dominion appointees. The same question arose in respect of the present Municipal Board, which was set up by the Ontario Municipal Board Act, 1932. That Act, it is submitted, confers judicial functions on the Board, the members of which are not appointed by the Governor-General as required by s. 96 of the British North America Act, 1867, and is ultra vires the Provincial Legislature. [Reference was made to the British North America Act, 1867, ss. 96, 99, 100; the Ontario Municipal Board Act, 1932; and the Township of York Act, 1936, s. 2.] The particular

1938 A.C. p. 418.

order made raised the whole question of the validity of the Board's proceedings. It is not contested that even an administrative body can, if the legislation is appropriate, require many things to be done by the parties in order that the body may better perform their administrative duties. The question in this case is whether the Board is exercising administrative or judicial functions. If the members of the Board were appointed and paid by the Dominion, the present objection could not have been raised. Some Parts of the Ontario Municipal Board Act, 1932, are severable; but Part III. and Part VIII., which deal respectively with "General Jurisdiction and Powers" and "Practice and Procedure," and are the material Parts, are not severable. Those provisions appear to confer on the Board powers similar to those of a Superior Court; the Board has everything appertaining to a Superior Court except the judge.

Sect. 2 of the Township of York Act, 1936, which attempts to confer additional jurisdiction on the improperly constituted Board, cannot in any circumstances be severed, and that section is itself ultra vires as conferring judicial powers on the Board. The rules made by the Municipal Board under the Act of 1932 regulating its practice and procedure relate to the exercise of its judicial rather than to any administrative functions vested in it. [Reference was then made to the following authorities on the question of the exercise of judicial and administrative functions: *Polson Iron Works* v. *Munns* (1); *Colonial Investment & Loan Co.* v. *Grady* (2); *Winnipeg Electric Ry. Co.* v. *City of Winnipeg* (3); *Small Debts Recovery Act, Re* (4); *Toronto R. W. Co. and City of Toronto, Re* (5); *Toronto Ry. Co.* v. *Toronto City* (6); *McLean Gold Mines, Ld., and Attorney-General for Canada, Re* (7); *Welland, County of, Re* (8); *Roskiwich* v. *Roskiwich* (9); *Clubine* v. *Clubine* (10); *The King ex rel. The Township of Stamford* v. *McKeown et al.* (11); *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (12); and *O. Martineau & Sons, Ld.* v. *Montreal*

1938 A.C. p. 419.

(1) (1915) 24 D.L.R. 18, 21.
(2) (1915) 24 D.L.R. 176.
(3) (1916) 30 D.L.R. 159, 174, 178.
(4) (1917) 37 D.L.R. 170.
(5) (1918) 44 O.L.R. 381, 387, 397.
(6) [1920] A.C. 446, 454.
(7) (1923) 54 O.L.R. 573.
(8) (1933) Ont. W.N. 470.
(9) [1932] 1 D.L.R. 135.
(10) [1937] O.R. 636.
(11) [1934] O.R. 662; [1935] O.R. 109.
(12) [1931] A.C. 275, 294.

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City. (1) On the question of severance reference was made to *Initiative and Referendum Act, In re* (2); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (4); *Attorney-General for Canada* v. *Attorney-General for Ontario* (5); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (6); *and Attorney-General for Ontario* v. *Attorney-General for Canada.* (7)]

Frank Gahan for the Attorney-General for Canada, intervening, supported the appeal of the Toronto Corporation, and adopted the argument of W. N. Tilley K.C.

Gershom W. Mason K.C. (of the Ontario Bar) for the respondent corporation. The Ontario Municipal Board has jurisdiction over three matters: *(a)* Provincial railways; *(b)* Municipalities; and *(c)* Public utilities; and when the language of the Act of 1932 appears in some places to be general it must be read having regard to the fact of what the jurisdiction clearly consists: *Fielding* v. *Thomas.* (8) If there has been any exercise of judicial power, then this case is the same as *O. Martineau & Sons, Ld.* v. *Montreal City* (9)—it is a power that does not take away from the functions of the Superior Court as it existed at Federation. In the following Acts, under which substantial powers are conferred on the Municipal Board, there is no trace of anything in the nature of judicial, it is all purely administrative: Assessment Act, R.S.O., 1927, c. 238; the Public Commercial Vehicle Act, 1933, S.O., c. 49; the Public Vehicle Act, 1933, S.O., c. 53; and the Public Utilities Act, R.S.O., 1927, c. 249, ss. 52, 64. Those Acts show that in all matters connected with railways, municipalities and public utilities very wide powers were given to the Board as to the field in which it functions. The real intent of the impugned legislation, it is submitted, was never to create a judicial body at all, but to create an administrative one, and then it was necessary to enable it to function properly that it should have certain powers, and the powers which have been given to it are in part powers which would normally be exercised by a Court. An administrative body

1938 A.C. p. 420.

(1) [1932] A.C. 113, 115.
(2) [1919] A.C. 935.
(3) [1924] A.C. 203.
(4) [1925] A.C. 561.
(5) [1937] A.C. 355.
(6) [1937] A.C. 377, 385, 387.
(7) [1925] A.C. 750.
(8) [1896] A.C. 600.
(9) [1932] A.C. 113.

does not, however, in such circumstances become a Court: the powers, so far as they relate to administration, are those of the executive. In pith and substance the Ontario Municipal Board is an administrative body.

The Municipal Board is not assuming the functions of a Superior Court as such a Court is contemplated in the British North America Act: the Board created by the Legislature of the Province and exercising the power given it by s. 2 of the 1936 Act to vary and fix the water rates is not functioning in such a manner as to usurp the jurisdiction of a Superior, District, or County Court, because no Court ever had jurisdiction to set aside a contract between parties and impose terms upon them which they had not contracted for. A Province has a right to constitute, organize and maintain a Court, provided that it does not transgress against the provisions of ss. 96, 99 and 100 of the British North America Act. With regard to arbitration and the suggestion that judicial functions are there exercised, the only kind of arbitration which the Board deals with arises under a statute—where lands are taken for some public purpose and the Municipal Board is nominated to fix compensation: exactly the same position arose long before Confederation.

1938 A.C. p. 421.

[The following authorities were cited as bearing on various aspects of the foregoing argument: *Rimmer* v. *Hannon* (1); *Smith* v. *City of London* (2); *Fielding* v. *Thomas* (3); *O'Connor* v. *Waldron* (4); *Board of Education* v. *Rice* (5); *Attorney-General for Quebec* v. *Slanec & Grimstead* (6); *City of Winnipeg* v. *Winnipeg Electric Ry. Co.* (7); *Toronto Ry. Co.* v. *Toronto City* (8); *Winnipeg Electric Ry. Co.* v. *City of Winnipeg* (9); *Township of Sandwich East* v. *Union Natural Gas Co.* (10); *Dominion Canners* v. *Costanza* (11); *Solloway, Mills & Co., Ld., in Liquidation, Re. Ex parte I. W. C. Solloway* (12); and *Toronto R. W. Co. and City of Toronto, Re.* (13)] There are powers given by the Ontario Municipal Board Act, 1932, which are

(1) (1921) 60 D.L.R. 637, 640.
(2) (1909) 20 O.L.R. 133, 154.
(3) [1896] A.C. 600, 612.
(4) [1935] A.C. 76, 81, 82.
(5) [1911] A.C. 179, 182.
(6) [1933] 2 D.L.R. 289, 327.
(7) (1920) 54 D.L.R. 445, 452, 453.
(8) [1920] A.C. 446, 455, 458.
(9) (1916) 30 D.L.R. 159.
(10) (1924) 56 O.L.R. 399; (1925) 57 O.L.R. 656.
(11) [1923] Can. S.C.R. 46, 54.
(12) [1935] O.R. 37, 43.
(13) (1918) 44 O.L.R. 381, 388, 390, 394.

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dissimilar to those of a Court; it was never intended that the body should sit as a Court, and it does not interfere with or take away from the functions of the Courts. In *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (1) the fixing of an assessment was held not to involve the exercise of any judicial power, and the fixing of a rate is clearly of the same nature.

With regard to severability, any portions of s. 2 of the Township of York Act, 1936, which may be open to objection, are severable from the rest of the section—everything can be excluded except the part relating to the fixing of the rates. [On the question of severability reference was made to *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *Brooks-Bidlake and Whittall, Ld.* v. *Attorney-General for British Columbia* (3); *Strickland* v. *Hayes* (4); *Pickering* v. *Ilfracombe Ry. Co.* (5); *Dyson* v. *London & North Western Ry. Co.* (6); *Salmon* v. *Duncombe* (7); *Berea College* v. *Commonwealth of Kentucky* (8); *Loeb* v. *Columbia Township Trustees* (9); 59 Corpus Juris, p. 642, s. 206; *Rex* v. *Company of Fishermen of Faversham* (10); and *Great West Saddlery Co.* v. *The King* (11).] On the jurisdiction of the Courts to declare an assessment illegal see *City of Ottawa* v. *Wilson.* (12)

1938 A.C. p. 422.

There is a distinction between judicial functions and judicial powers. By "functions" is meant the field of subject-matter in which the Court or Board operates. "Powers" imports the power of the Court to grant injunctions or to do something of that character. Of the functions of the Municipal Board there is in no case any taking away from the jurisdiction of the Courts by the powers that were vested in the Board. For the purpose of convenience certain powers, as distinct from functions, that are normally vested in a Court, have been given to the Board; but only as incidental to and as appropriate machinery for the exercise of administrative functions. In pith and substance the whole of the legislation in question constitutes an administrative tribunal, and there is nothing in the thirty-one years' history of this Board and its

(1) [1931] A.C. 275, 297.
(2) [1925] A.C. 750, 753.
(3) [1923] A.C. 450, 454.
(4) [1896] 1 Q.B. 290, 292.
(5) (1868) L.R. 3 C.P. 235, 250.
(6) (1881) 7 Q.B.D. 32, 36-7.
(7) (1886) 11 App. Cas. 627, 634.
(8) (1908) 211 U.S. 45.
(9) (1900) 179 U.S. 472, 490.
(10) (1799) 8 T.R. 352.
(11) [1921] 2 A.C. 91, 119.
(12) [1933] O.R. 21, 24.

predecessor to suggest that it has acted arbitrarily or as a Court.

The powers necessary for the making of the order in question are proper powers for an administrative Board. The practice with regard to examination and discovery is growing widely in Canada. Powers of the character in question existed in Boards which were not Courts before Confederation: *Reg.* v. *Coote.* (1) The nature of the powers in the Fire Marshals for Montreal and Quebec Act, 1868 (31 Vict. c. 32 (Quebec)), were as great or greater than those given to this Board. [Reference was also made to Holmested's Judicature Act, 4th ed., p. 797, r. 327; p. 807, r. 331; p. 811, r. 333; p. 815, r. 341; p. 822, r. 345; p. 825, r. 348; and p. 850, r. 349; and to *St. John* v. *Fraser.* (2)] In this case the statutes have expressly given the power to do what was sought to be done, whereas in *Huish* v. *Liverpool Justices* (3) and *Sutton* v. *Great Northern Ry. Co.* (4) the point was whether the statutes did give the jurisdiction sought to be exercised.

1938 A.C. p. 423.

Salter A. Hayden K.C. for the Attorney-General for Ontario adopted the argument on behalf of the respondents, upholding the validity of the Ontario Municipal Board Act, 1932. Sect. 44 *(c)* and s. 54 were sections which might be said to enlarge the jurisdiction of the Board to such an extent that it became, if not a Court, very like one. If s. 44 *(c)* is read by itself, and without relation to any other provisions of the Act, and without regard to any limitations which may be inherent in it, it undoubtedly gives to the Board powers very much as a Court in a certain field. It is suggested, however, that s. 44 *(c)* and s. 54 must be read in the context with the limitation imposed on them by the other sections of the Act: *Macleod* v. *Attorney-General for New South Wales.* (5) Once it is accepted that the purpose of the Act of 1932 is to set up an administrative tribunal, it is submitted that s. 44 *(c)* is only administrative machinery to enable the Board to do that which it has jurisdiction to do. [Reference was also made to ss. 41, 42 and 43 of the Ontario Municipal Act, 1932, and to *Toronto Ry. Co.* v. *Toronto City.* (6)]

(1) (1873) L.R. 4 P.C. 599, 604-5.
(2) [1935] Can. S.C.R. 441, 454.
(3) [1914] 1 K.B. 109, 116.
(4) [1909] 2 K.B. 791, 797.
(5) [1891] A.C. 455, 457.
(6) [1920] A.C. 455, 461.

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1938 A.C. p. 424.

The Act of 1932 was not a colourable attempt to encroach on the exclusive power of the Dominion under s. 96 of the British North America Act to appoint judges. The Act can be severed if what remains can survive the operation: *Lymburn* v. *Mayland.* (1) The Board could continue to function and operate just as well without as with s. 44 *(c)* and s. 54. The same argument as to severance applies to s. 2 of the Township of York Act, 1936.

Tilley K.C. replied. The Province is entirely prohibited from entering the Dominion legislative field: *Alberta Railway Act, In re.* (2) The ambit of the administrative powers must not include the power as between the parties to determine the legal effect of documents. [Reference was made to *Canadian Pacific Ry. Co.* v. *Grand Trunk Ry. Co.* (3) and *Sutton* v. *Great Northern Ry. Co.* (4), and on the position of a Court of Record to *Kemp* v. *Neville* (5) and *Reg.* v. *Corporation of Maidenhead.* (6)] Either the Board was not properly constituted by the original Act of 1906, or, in the alternative, some of the sections of the Act of 1932 are designed to create a Court and to give the Board all the powers of the judges of a Court, and they must therefore be held ultra vires, and the order in question cannot operate. No sufficient reason has been given for severing what has been called the invalid part of s. 2 of the Township of York Act, 1936, from the other part.

1938. Jan. 24. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the Court of Appeal of Ontario dismissing an appeal from an order of the Ontario Municipal Board which ordered the appellants to make discovery of documents and to permit inspection of their waterworks system, and ordered the appellants' Commissioner of Works to be examined on discovery. The Board made the order in pursuance of powers contained in the Ontario Municipal Board Act, 1932, and in the course of an application brought before them by the respondents, the Corporation of the Township of York, in pursuance of the Township of York Act, 1936. The contentions of the appellants are: (1.) that the Board is invalidly constituted as being a Superior Court constituted

(1) [1932] A.C. 318, 327.
(2) (1913) 48 Can. S.C.R. 9; [1915] A.C. 363.
(3) (1914) 49 Can. S.C.R. 525.
(4) [1909] 2 K.B. 791, 796.
(5) (1861) 10 C.B. (N.S.) 523.
(6) (1882) 8 Q.B.D. 339, 352; 9 Q.B.D. 494, 500.

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in violation of ss. 96, 99 and 100 of the British North America Act; (2.) that in any case the power to make the order in question is one that could only be exercised by such a Court; and (3.) that the Act of 1936 is invalid as purporting to vest the jurisdiction of a Superior Court in the Municipal Board.

A short statement of the circumstances leading to the dispute between the parties will suffice. In 1916 the Township entered into an agreement with the City whereby the City agreed to supply water to the Township on terms, including payment at the rate of 20 cents per 1000 gallons. The agreement contained a provision that the rate might be altered by agreement or by arbitration. An arbitration clause provided for arbitration by two officials of the respective corporations, and in the event of disagreement by a County Court judge. The agreement was confirmed by a Statute of Ontario, 1917 (7 Geo. 5, c. 98). In 1936 the Legislature of Ontario passed the Township of York Act, 1936 (1 Edw. 8, c. 88), which provided in s. 2 that notwithstanding the provisions of the agreement of 1916: "either party to the said agreement may from time to "time apply to the Ontario Municipal Board to vary the "rates to be charged for water supplied by the said city "corporation under the terms of the said agreement or to "settle any differences arising between the parties to the "said agreement as to the construction thereof, or as to any "matters relating to or arising out of the agreement, and "the Ontario Municipal Board shall have jurisdiction to "vary and fix the said rates, and to hear and determine any "such application, and the decision of the said board on "any such application shall be final and conclusive and "shall not be subject to appeal."

1938 A.C. p. 425.

Application was made by the Township to the Municipal Board in pursuance of this Act to vary the rate for water supplied, and it was in respect of that application that the order complained of was made.

It will be seen that the attack of the appellants is two-fold. They dispute the validity of any act of the Municipal Board as at present constituted, and if this contention fails, they attack the validity of the Act of 1936.

The first question touches a matter of first importance to the people of Canada. While legislative power in

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relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined. Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted.

But a study of the provisions of the Municipal Board Act read in the light of its history as a successor to the Ontario Railway and Municipal Board (see ss. 6 and 7) leads their Lordships to the conclusion that the Board is primarily, in "pith and substance," an administrative body. Parts IV., V., VI. and VII. are almost entirely administrative, and though some of them are now repealed, and the duties of the Board transferred to other administrative channels, their existence assists to reveal the original legislative intention. Mr. Gershom Mason, in his argument for the respondents, gave a survey of the multifarious administrative duties which from time to time had been imposed upon the Board and its predecessor by legislation of the Province. It is unnecessary to review the statutes; it is sufficient to say that in respect of Municipal Institutions, Highways, Railways, Public Utility Acts dealing with Water, Gas and Electricity, Telephones, and apparently other matters as well, the Board is entrusted with duties of supervision and decision which are purely administrative, and in their totality would appear to make it one of the most important parts of administrative machinery in the Province. Primarily, as has been said, its function is administrative. But Mr. Tilley, for the appellants, emphasized with much force the provisions in Part III. of the Act, especially ss. 41-46, 54 and 59, as

1938 A.C. p. 427.

indicating that the Board was entrusted with the jurisdiction and powers of a Superior Court, and within the purview of those sections was in fact constituted a Superior Court. It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or a County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. They are, however, severable; there is nothing to suggest that the Board would not have been granted its administrative powers without the addition of the judicial powers complained of. The objection to the validity of the Board as such therefore fails. Their Lordships have found it unnecessary to discuss in detail how far some of the powers alleged to be judicial are in fact merely administrative. The question does not arise in the present case, and, in accordance with their Lordships' usual practice in constitutional matters, they will not embarrass future discussion when, if ever, such a dispute arises.

1938 A.C. p. 428.

The remaining parts of the case seem to present little difficulty. The powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a Court of Justice, are not inconsistent

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with the powers of an administrative body whose duty it may be to ascertain the facts with which they are dealing. The powers in this case seem to be in substance identical with those in the Combines Investigation Act, R.S.C. 1927, c. 26, the validity of which was affirmed in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1), and the existence of which was held not to make a commissioner armed with them a Court of Justice in *O'Connor* v. *Waldron*. (2) The only remaining question is whether the Act of 1936 was valid. Their Lordships agree with the judgment of the Chief Justice of Ontario on this point. Assuming that the first part of the section purports to confer judicial function on the Board, it is clearly inoperative; but the second part relates to an administrative function, and appears to their Lordships clearly severable. The result is that the order complained of was a valid order. The order of the Court of Appeal affirming it was right, and this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

Solicitors for appellants: *Freshfields, Leese & Munns.*

Solicitors for respondents: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Ontario: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

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(1) [1931] A.C. 310. (2) [1935] A.C. 76.

[PRIVY COUNCIL.]

J.C.*
1938
July 27.

1938 A.C.
p. 708.

SHANNON AND OTHERS.....APPELLANTS;

AND

LOWER MAINLAND DAIRY PRODUCTS BOARD..... } RESPONDENTS.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA

(INTERVENING).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada—British Columbia—Natural products marketing legislation—Scheme of control and regulation—Imposition of licence fees—Regulation of particular businesses entirely within the Province—Intra vires of the Provincial Legislature—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (2.), (3.); s. 92 (9.), (13.), (16.)—Natural Products Marketing (British Columbia) Act, 1936, R.S.B.C., c. 165.

The Natural Products Marketing (British Columbia) Act, 1936, the scheme of which is to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions, including the power to fix and collect licence fees, is in pith and substance an Act to regulate particular businesses entirely within the Province, and is therefore intra vires of the Provincial Legislature under s. 92 (13.) of the British North America Act, 1867, which gives the Provincial Legislature the exclusive right to legislate in relation to "property and civil rights in the Province."

Further, the regulation of trade within the Province being valid, the method of regulation by a system of licences is also admissible, and it is no objection that licence fees should be charged either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes, and the Act is accordingly intra vires of the Provincial Legislature under s. 92 (9.) of the British North America Act, 1867. The licence fees can also be supported as validly imposed, on the ground that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13.) and (16.) of the Act of 1867.

Natural products as defined in the Act are not confined to natural products produced in British Columbia, but the Act is confined to dealings with such products as are situate within the Province. "Transportation" is confined to the passage of goods whose transport begins within the Province to a destination also within the Province. 1938 A.C. p. 709.

Judgment of the Court of Appeal for British Columbia affirmed.

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* *Present:*—LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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SHANNON v. LOWER MAINLAND DAIRY PRODUCTS BOARD.

APPEAL (No. 81 of 1937) from a judgment of the Court of Appeal of British Columbia (August 10, 1937), reversing a judgment of Manson J. in the Supreme Court of British Columbia (May 29, 1937).

The appellants, George Walkem Shannon, Thomas Hedley McDonald, and Matthew Blackwood McDermid, dairy farmers, carrying on business in British Columbia, were affected by a milk marketing scheme approved by the Lieutenant-Governor in Council under the Natural Products Marketing (British Columbia) Act, 1936. The scheme set up the Lower Mainland Dairy Products Board, the respondents, who were the defendants in the action, in which the appellants as plaintiffs claimed a declaration that the Act was ultra vires of the Legislature of the Province, and that they were under no obligation to obtain licences from the defendant Marketing Board or to comply with any of their demands; and they further claimed an injunction to restrain the defendants from interfering with them.

The Attorney-General for the Province of British Columbia intervened in the proceedings.

The trial judge (Manson J.) declared the Act to be ultra vires of the Provincial Legislature, and he decided in favour of the plaintiffs.

Pending the defendants' appeal to the Court of Appeal the Lieutenant-Governor in Council, pursuant to s. 3 of the Constitutional Questions Determination Act, R.S.B.C., 1924, c. 46, on June 2, 1937, referred the following question to the Court of Appeal: "Is the Natural Products Marketing "(British Columbia) Act, as amended by the Natural "Products Marketing (British Columbia) Act Amendment "Act, 1936, and the Natural Products Marketing (British "Columbia) Act Amendment Act, 1936 (Second Session), "or any of the provisions thereof, and in what particular "or particulars or to what extent, ultra vires of the Legis- "lature of the Province of British Columbia?" The Court of Appeal (Martin C.J.B.C., McPhillips and Macdonald JJ.A.) answered that question in the negative by a judgment delivered on July 8, 1937, and reported at (1937) 52 B.C.R. 179.

1938 A.C. p. 710.

Following their decision in the reference case the Court of Appeal gave a formal judgment in the present case in

conformity with that decision, and they accordingly allowed the appeal.

1938. June 30; July 1, 4. *A. P. Duffes K.C.* for the appellants. The problem for consideration is very similar, from the opposite angle, to that which was decided by this Board in *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (1) The main question turns on the interpretation of the familiar provisions as regards legislative powers contained in the British North America Act, 1867, and the interpretation of certain provisions of ss. 91 and 92 of that Act in relation to the Natural Products Marketing (British Columbia) Act, R.S.B.C., 1936, c. 165, designed to provide for the appointment of Boards in British Columbia, or in parts thereof, to deal with schemes for marketing natural products. [Reference was made to the provisions of the Natural Products Marketing (British Columbia) Act, 1934, as amended to 1936, and to s. 91 (2.), (3.) and (29.), and s. 92 (2.), (10.), (13.) and (16.), of the British North America Act, 1867.] The Act in question does contravene the provisions of the British North America Act which provide that exclusive legislative power rests with the Parliament of Canada as regards regulation of trade and commerce and the raising of money by any mode or system of taxation. The Act does interfere, or provide for giving the Natural Products Boards power to interfere, with trade and commerce affecting the relationship between Provinces themselves. Further, the Act does involve a power to impose indirect taxation. The powers of the Lieutenant-Governor in Council, and the powers of the Board appointed by him, are not restricted in any way as regards finance. The definitions in the Act of 1936 are as wide as they could be, and there could not be wider provisions than those of ss. 3 and 4. While there is a provision about the marketing of natural products *within* the Province, yet it is submitted on construction that the power given would involve interference with marketing between British Columbia and any other Province. Interference to the extent that would result from the provisions of this Act would be contrary to the trade and commerce head of s. 91 of the British North America Act. The question must be one of degree to some extent. There is practically no

1938 A.C. p. 711.

(1) [1937] A.C. 377.

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restriction in the power as to the methods that such Boards may adopt and the orders they may give within the Province. With regard to the fixing of licences, they may be imposed upon any basis that the Board may choose. The test as to indirect taxation has been laid down in a number of cases; there is indirect taxation if it is found that, while apparently directly imposed on people, the result is not that they themselves will bear the burden, but that they will pass it on to somebody else.

The Act is ultra vires in the form in which it is found in c. 165 of the R.S.B.C., 1936. With regard to the "trade and commerce" point, it is submitted that there are two main fallacies at the root of the judgment of the Appeal Court. First, as to the essence of the judgment of this Board in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1); because in that case Lord Atkin, in delivering the judgment of the Board, pointed out that the Dominion Legislation had failed, it seems to have been assumed by the Court of Appeal in the present case that when the Provincial Legislature set out with the intention of dealing with trade in the Province they could scarcely fail, because this Board said that the totality of legislative power in relation to all matters rested with the Dominion and the Provincial Parliaments. The appellants themselves rely on what the Board said in the Dominion case (1) as being in their favour. The Dominion Act was in essence, it is submitted, an Act to regulate Dominion trade and commerce; but although it was that, this Board held that it was none the less ultra vires because in attempting to exercise that legislative power the Dominion had infringed the exclusive power of the Provincial Legislatures, not merely in an incidental way, but essentially. Here, the appellants seek to convert that line of reasoning, and apply it to the present case, assuming that the purpose here was to deal with property and civil rights in the Province, and to authorize interference and action by Boards within the Province. It is submitted that if it is found that the scope of the Act authorized interference, vital and essential interference, with the regulation of trade and commerce in the Dominion, that is, outside the Province in question, then there is a situation similar to that which the Board dealt with in the Dominion case. (1)

1938 A.C. p. 712.

(1) [1937] A.C. 377.

Regard must be had not only to what is intended to be done, but how it is attempted. The basis of the judgments of the Court of Appeal is that it is assumed that, because the object of the Act is to restrict its interference to within the Province, that that broadly saves it, although that interference under the terms of the Act may be such as to be a material interference with people and things outside the Province. The mere fact that interference within the Province will affect people outside, the mere fact that people outside may be incidentally affected as traders, may not be enough; but if people outside the Province may be, as a natural effect of this Act, interfered with as traders not merely incidentally but essentially, then it is submitted that that may be fatal.

The definition of natural products seems in its terms to cover products which are not native to the Province. There is an assumption in the judgment on appeal that the Act does not cover anything but native products of the Province.

The second fallacy in the judgments under appeal is the failure to appreciate what, it is submitted, is the clear distinction between the natural effect of an Act like the present and that of the Act in question in *Gallagher* v. *Lynn*. (1) Under the provisions of the present Act the Marketing Board would be free and unrestricted as to method, and in the matter of finance. The raising of money by licence fees would be an imposition of a financial burden on traders, and would not be an expense of running the scheme. The essence of this Act is an interference with trade and commerce in products not necessarily native to the Province, and the powers, financial and otherwise, necessarily interfere with trade and commerce outside the Province.

1938 A.C. p. 713.

With regard to the taxation question, an imposition that may be nominally of the nature of direct taxation may quite easily become indirect taxation. Further, direct taxation may easily conflict with s. 91 of the British North America Act if it is not in a true sense for local revenue purposes, but is essentially, or to a material extent, for a purpose that could be classed fairly as the regulation of trade and commerce in the sense in which those words are used in s. 91.

(1) Ibid. 863.

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Reliance is placed on the general reasoning in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1), a very similar case to the present. [Reference was also made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2); *Gallagher* v. *Lynn* (3); *Citizens Insurance Co. of Canada* v. *Parsons* (4); *Russell* v. *The Queen* (5); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.* (6); *Rex* v. *Caledonian Collieries* (7); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (8); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (9); *Cotton* v. *The King* (10); and *Burland* v. *The King.* (11)]

In the present case there is practically a surrender by the Provincial Legislature of its legislative responsibility to another body; surely the limit in that type of delegation has been reached in this case, where the delegation is to an executive body: *In re The Initiative and Referendum Act.* (12)

1938 A.C. p. 714.

Applying the above cited authorities as applicable to the various branches of the argument, the decision appealed from is in conflict with a number of them; and as a matter of interpretation the provisions of ss. 91 and 92 of the British North America Act, 1867, lead to the result that Manson J. was right, and the appeal should be allowed.

W. B. Farris K.C., Wilfrid Barton K.C. and *W. E. Haskins* for Attorney-General for British Columbia (intervener) were not required to argue on the question of delegation.

The appellants' contentions are limited by the following admissions: *(a)* it is within the competency of the Provincial Legislature to enact legislation regulating the marketing and production of natural products so long as it does not encroach on the powers of the Dominion; and *(b)* the present Act is a bona fide endeavour on the part of the Province to regulate the marketing and production of natural products within the jurisdiction of the Province.

(1) [1931] Can. S.C.R. 357, 359.
(2) [1937] A.C. 377, 386.
(3) [1937] A.C. 863.
(4) (1881) 7 App. Cas. 96, 112.
(5) (1882) 7 App. Cas. 829.
(6) [1933] A.C. 168.
(7) [1928] A.C. 358, 361-2.
(8) [1925] A.C. 561.
(9) [1927] A.C. 934, 938.
(10) [1914] A.C. 176.
(11) [1922] 1 A.C. 215.
(12) [1919] A.C. 935.

The intervener's argument falls under three heads. First, the Province has the sole right, within its proper limits, to pass legislation concerning the marketing and production of natural products. Secondly, the pith and substance of the Act under discussion is to control the marketing and production of natural products in British Columbia, within the confines of the Province, and within the legislative authority of the Province, and is intra vires. Thirdly, the section of the Act permitting the Board to charge licence fees to those engaged in marketing and production of natural products is intra vires. Nothing need be added on the first proposition, about which there can be no doubt. With regard to the second head, *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1) shows that the fact that the Act does affect outside interests does not affect its validity provided that it is within the Provincial jurisdiction. That leads to the question of the analysis of the Act to ascertain what it was in pith and substance. In dealing with the Act its whole intent must be looked at, and local conditions taken into account. The pith and substance is contained in ss. 2, 4, 9 and 15. As to "transportation," the Province is under this Act limited to Provincial railways, bus lines and roads, which are not controlled by Federal authority, and which do not interfere generally with trade and commerce as between the Provinces. [Reference was made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) and *MacLeod* v. *Attorney-General for New South Wales.* (3)]

1938 A.C. p. 715.

Everything has been done to make it clear that there is no intention to encroach on the Dominion prerogative, and the Act remains strictly within the Provincial rights. There are three views in regard to the third heading: *(a)* The licence fees imposed are direct taxes within s. 92 (2.) of the British North America Act, 1867. *(b)* If not a tax within s. 92 (2.), they are "licences" which come within s. 92 (9.) of the Act of 1867. *(c)* If the fees do not come within either *(a)* or *(b)*, then they are service or administrative charges properly made under s. 92 (13.) of the Act of 1867, which deals generally with property and civil rights in the Province. The fees may also come under head (16.) of s. 92, which deals with "generally all matters

(1) [1902] A.C. 73, 80. (2) [1924] A.C. 328, 345.
(3) [1891] A.C. 455.

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"of a merely local or private nature in the Province." It is submitted that it is purely a licence within *Hodge* v. *The Queen* (1), and that the province has the right to licence: *Reference re The Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935. (2) If the Province thus had the right to licence—and that was confirmed by this Board—the licence fee must be incidental to the giving of the licence. [Reference was also made to *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*. (3)]

Wilfrid Barton K.C. followed. When there are words from which it may be implied that a subordinate Legislature intends to keep within its own sphere of legislative jurisdiction, the words must be given their effect, and they limit the enactment within the legislative sphere of the subordinate Legislature. For the effect in legislation of the words "subject to," see *James* v. *Cowan*. (4)

A. P. Duffes K.C. replied. The transportation provisions in this Act clearly show where the legislative powers have been exceeded. It is a necessary qualification under s. 92 (2.) or (9.) that the licence fees must be for Provincial revenue; the revenue obtained from the licence fees in question is not for Provincial revenue, but for another purpose altogether. The test is whether there is inherent in the Act taxation of an indirect nature. *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (5) is clearly distinguishable from the present case, and the effect of that case, and of those following it, is to make the present matter an interference with the taxation rights of the Dominion Legislature.

1938 A.C. p. 716.

The respondents did not appear.

July 27. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decision of the Court of Appeal for British Columbia reversing a decision of Manson J., who had given judgment in the action in favour of the plaintiffs, the present appellants. The appellants were dairy farmers carrying on their business in the Province of British Columbia, and were affected by a Milk Marketing Scheme approved by the Lieutenant-Governor

(1) (1883) 9 App. Cas. 117.
(2) [1936] Can. S.C.R. 398, 411.
(3) [1931] Can. S.C.R. 357, 362.
(4) [1932] A.C. 542, 558.
(5) [1931] Can. S.C.R. 357.

in Council under the Natural Products Marketing (British Columbia) Act, Chapter 34, of the Statutes of 1936. The scheme set up the Lower Mainland Dairy Products Board (the defendants), and in the action the plaintiffs claimed a declaration that the Act was ultra vires of the Legislature of the Province; that the plaintiffs were under no obligation to obtain licences from the defendants, or comply with any of their demands; and they further claimed an injunction to restrain the defendants from interfering with them. In the proceedings the Attorney-General for the Province intervened, and he alone was represented as respondent before this Board. The learned trial judge decided in favour of the plaintiffs. The Court of Appeal reversed his decision, following judgments they had delivered on a reference to them by the Lieutenant-Governor in Council asking whether the Act in question was ultra vires of the Legislature of the Province. Having answered the question in the negative they, without further discussion, allowed the appeal. The legislative history of the impugned statute is as follows. In November, 1934, the Legislature of British Columbia passed an Act entitled the Natural Products Marketing (British Columbia) Act, providing that the Lieutenant-Governor in Council might constitute a British Columbia Marketing Board, and arming the Board with powers to act in co-operation and conjointly with the Dominion Marketing Board constituted under the Dominion Act, the Natural Products Marketing Act, 1934. In November, 1935, the Governor-General in Council had referred to the Supreme Court of Canada the question whether the Dominion Act was ultra vires of the Dominion Legislature. On June 17, 1936, the Supreme Court held in *Reference re The Natural Products Marketing Act*, 1934, *and Its Amending Act*, 1935 (1), that it was ultra vires, and their decision was affirmed by this Board on January 28, 1937. [*Attorney-General for British Columbia* v. *Attorney-General for Canada.* (2)] Meantime, in April, 1936, the Legislature of British Columbia had amended the Provincial Act of 1934, which now is in the form enacted in the Revised Statutes of British Columbia, 1936, c. 165, together with an additional clause as to severability enacted in an Amendment Act of 1937, c. 41. It is not necessary to set out all the provisions of the Act

1938 A.C. p. 717.

(1) [1936] Can. S.C.R. 398. (2) [1937] A.C. 377.

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in question, but reference should be made to the following definitions: " 'Marketing' includes buying and selling, "shipping for sale or storage, and offering for sale: and in "respect of a natural product includes its transportation "in any manner by any person." " 'Natural product' "means any product of agriculture, or of the forest, sea, "lake, or river, and any article of food or drink wholly or "partly manufactured or derived from any such product."

Sect. 4, sub-s. 1, of the Act provides: "The purpose and "intent of Part I. of this Act is to provide for the control "and regulation in any or all respects of the transporta- "tion, packing, storage, and marketing of natural products "within the Province, including the prohibition of such "transportation, packing, storage, and marketing in whole "or in part." The scheme of the Act is to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions. In particular the Lieutenant-Governor in Council may vest in any Marketing Board the powers, s. 4A *(d)*, "to fix and collect yearly, half-yearly, quarterly, or month- "ly licence fees from any or all persons producing, packing, "transporting, storing, or marketing the regulated product; "and for this purpose to classify such persons into groups, "and fix the licence fees payable by the members of the "different groups in different amounts; and to recover any "such licence fees by suit in any Court of competent juris- "diction."

1938 A.C. p. 718.

Sect. 4A *(j)*: "To use in carrying out the purposes of "the scheme and paying the expenses of the board any "moneys received by the board."

The attack on the Act was made on these grounds:—

(1.) That it encroaches on the class of subjects enumerated in s. 91 (2.) of the British North America Act, 1867—the regulation of trade and commerce.

(2.) That it also encroaches on s. 91 (3.)—the raising of money by any mode or system of taxation.

(3.) That without constitutional authority it delegates legislative power to the Lieutenant-Governor in Council.

It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the British North America Act. Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. There is no such restriction in the Act, and the limited construction would probably cause difficulty if it were sought at some future time to co-operate with a valid Dominion scheme. But the Act is clearly confined to dealings with such products as are situate within the Province. It was suggested that "transportation" would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that "transportation" is confined to the passage of goods whose transport begins within the Province to a destination also within the Province. It is now well settled that the enumeration in s. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province: *Citizens Insurance Co. of Canada* v. *Parsons* (1); *Reference re The Natural Products Marketing Act*, 1934, *and Its Amending Act*, 1935. (2) And it follows that to the extent that the Dominion is forbidden to regulate within the Province, the Province itself has the right under its legislative powers over property and civil rights within the Province. The appellants did not dispute that there was a bona fide intention by the Province to confine itself to its own sphere, but they contended that, whatever the intention, the Province had in fact encroached upon the Dominion sphere. If they could have established that contention, they would have been in a stronger position. In this respect their Lordships desire to quote a passage from the opinion of Lord Atkin in the House of Lords in

1938 A.C. p. 719.

(1) 7 App. Cas. 96.

(2) [1936] Can. S.C.R. 398; 1937] A.C. 377.

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Gallagher v. *Lynn* (1), which was cited by Martin C.J., and which it will be convenient to bring into the line of authority on constitutional cases arising in the Dominions: "My Lords, the short answer to this is that this Milk Act "is not a law 'in respect of' trade; but is a law for the "peace, order and good government of Northern Ireland "'in respect of' precautions taken to secure the health of "the inhabitants of Northern Ireland by protecting them "from the dangers of an unregulated supply of milk. "These questions affecting limitation on the legislative "powers of subordinate parliaments or the distribution of "powers between parliaments in a federal system are now "familiar, and I do not propose to cite the whole range "of authority which has largely arisen in discussion of the "powers of Canadian Parliaments. It is well established "that you are to look at the 'true nature and character "'of the legislation': *Russell* v. *The Queen* (2); 'the pith "'and substance of the legislation.' If, on the view of the "statute as a whole, you find that the substance of the "legislation is within the express powers, then it is not "invalidated if incidentally it affects matters which are "outside the authorized field. The legislation must not "under the guise of dealing with one matter in fact en-"croach upon the forbidden field. Nor are you to look only "at the object of the legislator. An Act may have a per-"fectly lawful object, e.g., to promote the health of the "inhabitants, but may seek to achieve that object by in-"valid methods, e.g., a direct prohibition of any trade with "a foreign country. In other words, you may certainly "consider the clauses of an Act to see whether they are "passed 'in respect of' the forbidden subject. In the "present case any suggestion of an indirect attack upon "trade is disclaimed by the appellant. There could be no "foundation for it. The true nature and character of the "Act, its pith and substance, is that it is an Act to pro-"tect the health of the inhabitants of Northern Ireland; "and in those circumstances, though it may incidentally "affect trade with County Donegal, it is not passed 'in "'respect of' trade, and is therefore not subject to attack "on that ground."

(1) [1937] A.C. 863, 869.

(2) 7 App. Cas. 829, 839.

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1938 A.C. p. 721.

The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore intra vires of the Province.

The second objection made to the Act was that it provided for the raising of money by a mode or system of taxation, which is one of the class of subjects reserved to the Dominion by s. 91 (3.) of the British North America Act. The contention is directed to the power to impose licence fees which may be vested in Provincial boards by the Lieutenant-Governor in Council under s. 4A *(d)* of the British Columbia Act. The answer made was that the legislation was valid under the powers given to the Province to legislate as to the following classes of subjects (s. 92 (2.)) "direct taxation within the Province in order "to the raising of a revenue for Provincial purposes"; (s. 92 (9.)) "shop, saloon, tavern, auctioneer, and other "licences in order to the raising of a revenue for Provincial, "local, or municipal purposes"; (s. 92 (13.)) "property "and civil rights in the Province"; or, finally (s. 92 (16.)) "matters of a merely local or private nature in the Prov-"ince." Their Lordships do not consider it necessary to support this legislation by reference to s. 92 (2.). Without deciding the matter either way, they can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported. If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes. On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff J., took a somewhat narrow view of the Provincial powers under s. 92 (9.) in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1), where he says (2): "on the other hand, the last-mentioned head authorizes

(1) [1931] Can. S.C.R. 357. (2) Ibid. 364.

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1938 A.C. p. 722.

"licences for the purpose of raising a revenue, and does "not, I think, contemplate licences which, in their primary "function, are instrumentalities for the control of trade— "even local or provincial trade." It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words "other licences" in s. 92 (9.) should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference—namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13.) and (16.). The Chief Justice refers to fees on land registration, and mining and prospecting certificates. Another example might be the exaction of market tolls on the establishment of a new market. On these grounds the attack upon the Act based on the powers to exact licence fees must be held to fail.

The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act. Martin C.J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he there said.

For these reasons the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for the intervener: *Gard, Lyell & Co.*

J.C.* 1938 July 14; Nov. 4.

1939 A.C. p. 117.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ALBERTA . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Alberta—Bill taxing Banks operating in Province—Object and effect of legislation—Not in true sense taxation to raise revenue for Provincial purposes—Part of legislative plan to prevent operation of banking institutions—Ultra vires—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (15.), (16.); s. 92 (2.)—Bill entitled "An Act Respecting the Taxation of Banks," of the Alberta Legislature, third session, 1937.

A Bill passed by the Legislative Assembly of the Province of Alberta at the 1937 Third Session, entitled "An Act respecting the Taxation "of Banks," and reserved by the Lieutenant-Governor of Alberta for the signification of the pleasure of the Governor-General in Council, imposed on every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business in the Province, an annual tax, in addition to any tax payable under any other Act, of *(a)* ½ per cent. on the paid-up capital, and *(b)* 1 per cent. on the reserve fund and undivided profits, the tax to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province:—

Held, that on a comparison of the categories of subject-matters within the exclusive legislative competence of the Dominion and Provincial Legislatures respectively under ss. 91 and 92 of the British North America Act, 1867, and on a consideration of the object of the Taxation of Banks Bill and its effect if it became operative in the Province, the proposed taxation was not in any true sense taxation "in order to the raising of a "revenue for Provincial purposes" so as to be within the exclusive legislative competence of the Provincial Legislature under s. 92 (2.) of the British North America Act, but was merely part of a legislative plan to prevent the operation within the Province of those banking institutions which had been called into existence and given the necessary powers there to conduct their business by the only proper authority, the Parliament of the Dominion, under s. 91 of the British North America Act, and the Bill was therefore ultra vires the Provincial Legislature.

1939 A.C. p. 118. Dictum in *Bank of Toronto* v. *Lambe* (1882) 12 App. Cas. 575, at p. 587, discussed and explained.

Judgment of the Supreme Court of Canada [1938] Can. S.C.R. 100, affirmed.

APPEAL (No. 48 of 1938), by special leave, from a judgment of the Supreme Court of Canada (March 4, 1938) declaring, on a reference to them by the Governor-General of Canada under s. 55 of the Supreme Court Act, R.S.C.,

* *Present:*—LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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1927, c. 35, that the following three Bills passed by the Legislative Assembly of the Province of Alberta at its third session in 1937 were ultra vires of the Provincial Legislature: (1.) "An Act respecting the Taxation of Banks"; (2.) "An Act to Amend and Consolidate the Credit of "Alberta Regulation Act"; and (3.) "An Act to ensure "the Publication of Accurate News and Information." The Lieutenant-Governor of Alberta had withheld his assent to the three Bills and had reserved them on October 5, 1937, for the signification of the pleasure of the Governor-General in Council under ss. 90, 55 and 57 of the British North America Act, 1867.

The Supreme Court of Canada (Duff C.J., Cannon, Crocket, Davis, Kerwin and Hudson JJ.) were unanimous in their opinion. The judgments are reported at [1938] Can. S.C.R. 100.

During the hearing of this appeal by the Judicial Committee their Lordships, on July 7, 1938, held that inasmuch as the Social Credit Board and the Provincial Credit Commission, as constituted under the Alberta Social Credit Act, 1937, no longer existed, that Act having been repealed since the order of the Supreme Court on the reference in this case, those bodies could not perform the powers proposed to be conferred upon them in respect of the Press Bill and the Credit Regulation Bill, which Bills, therefore, could not now be brought into operation, and their Lordships, in accordance with the established practice of the Board in such circumstances, declined to hear arguments on this appeal so far as it related to those two Bills. The appeal accordingly proceeded in respect of the Taxation of Banks Bill alone. That Bill applied to every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings Bank business and transacting such business in the Province. The Bill imposed on every such bank an annual tax, in addition to any tax payable under any other Act, of *(a)* $\frac{1}{2}$ per cent. on the paid-up capital, and *(b)* 1 per cent. on the reserve fund and undivided profits. Penalties were provided for default in payment of the tax, and the tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province.

1939 A.C. p. 119.

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The respondents to this appeal as originally brought were the Attorney-General for Canada; the Canadian Press and Newspapers Associations; the Alberta Press; and the Chartered Banks of Canada.

The main ground of appeal was that the Bank Taxation Bill would, if assented to, be intra vires the Alberta Legislature as imposing direct taxation within the Province under s. 92 (2.) of the British North America Act, 1867.

1938. July 5, 7. *O. M. Biggar K.C., Cyril Radcliffe K.C.* and *J. J. Frawley K.C.* for the appellant. The three Bills which have been reserved are now awaiting the assent of the Governor-General. If he does not assent within a year, then they fall. The questions referred to the Supreme Court, while relating expressly to the Legislature of the Province of Alberta, might well have been expressed generally as relating the legislative powers of any of the other Provinces of Canada so far as the matters in question are concerned. [The terms of the three Bills were referred to.] All the Acts of the Province may be looked at to ascertain the scope and effect of the impugned Bills: the appellant's complaint about the judgments of the Supreme Court, however, is that they proceed on an assumption that the Alberta Social Credit Act, 1937, and certain other legislation, constituted part of a legislative scheme, and that, that legislation being bad, therefore the Bank Taxation Bill, being part of the scheme, is also bad: that is an improper inference. The following propositions are submitted: *(a)* In view of the decision in *Bank of Toronto* v. *Lambe* (1) the terms of the Bank Taxation Bill are such that if the Bill is assented to it will be valid legislation. *(b)* Provincial legislation imposing a tax on banks cannot properly be held ultra vires because of the burden which it imposes—the weight of the tax is a matter for the consideration only of the Governor-General in Council, and not for that of the Court, with the possible exception that, if the legislation were proved to be such as to prevent banks from exercising their powers in the Provinces, it might be held to be incompetent, that is, if the tax was so heavy that nobody could carry on banking in the Province. *(c)* The circumstances in which a statute will operate are always relevant to a proper understanding

1939 A.C. p. 120.

(1) (1887) 12 App. Cas. 575.

of its terms, but when those terms are free from ambiguity or imprecision, the intention of the Legislature is to be gathered from them, and other material cannot be referred to for the purpose of attributing to them a meaning different from that which they clearly convey. *(d)* The competence of Provincial Legislatures to exercise the powers which the British North America Act, 1867, conferred on them can not vary from Province to Province or from time to time, and so can not be affected by past or contemporaneous events other than the exercise of overriding Dominion legislative powers. *(e)* A Provincial statute which would be valid standing alone, and is capable of independent operation, cannot be held invalid on the ground that a common intention underlies both it and an earlier invalid statute on a different subject. *(f)* In any event, no inference as to the existence of a common intention underlying two statutes which do not depend one upon the other may properly be drawn in the absence of either admission or of evidence, assuming that either admission or evidence can affect the situation. *(g)* On the question of the competence of a Provincial Legislature to enact the provisions of a reserved Bill, neither the course of conduct of the Legislative Assembly, nor the avowed policy of the Provincial Government, have any relevance, since the King or the Governor-General is equally with the Assembly an essential part of the Legislature.

On the question of practical prohibitiveness—the killing of the goose that lays the golden eggs—it is submitted that the Bank Taxation Bill is not prohibitive at all; that, while it may be established that the tax is a heavy one, it is not one which would prevent bankers carrying on their business. It should not have been assumed to the contrary. The Bill is prima facie a valid one, and there must be something to set aside its validity. The intention must be taken from the words used. It is not proper to measure legislative competence by any considerations as to the policy or intentions of members of the Legislative Assembly or of that Assembly itself. When a Bill is reserved the Legislature has no mind or policy except what the words of the enactment express. [Reference was made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *In re The Insurance Act of Canada* (2);

1939 A.C. p. 121.

(1) [1924] A.C. 328, 332, 342. (2) [1932] A.C. 41, 51.

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MacBeth v. *Ashley* (1); *Attorney-General for Alberta* v. *Attorney-General for Canada* (2); and *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (3)]

The Press Bill [the provisions were referred to] has been said to be inoperative by the Supreme Court; it was also said to fall because it was part of the general legislative scheme of which the Alberta Social Credit Act was the basis; and it was also said to be bad as criminal law. There appears to be a difficulty in view of the fact that by the Alberta Social Credit Act, which has been repealed since the order of the Supreme Court in this case, there was created the Social Credit Board which was entrusted with important duties in connection with the operation of the Press Bill. It may have been intended to confer the powers to be exercised under the Press Bill on the chairman of a new board, but the Press Bill has not been amended to that effect, and the only board which need be considered is that constituted under s. 3 of the Alberta Social Credit Act, and that Act has been repealed.

[LORD MACMILLAN. It seems not so much a question of ultra vires as whether this is a piece of substantive legislation at all now before their Lordships. There can never be a chairman as constituted by s. 3 of the Alberta Social Credit Act to exercise the functions referred to in the Press Bill.]

1939 A.C. p. 122.

The position appears to be the same in regard to the Credit Regulation Bill, for the Bill requires credit institutions carrying on business in the Province to obtain licences from the Provincial Credit Commission, a body also created by the now repealed Alberta Social Credit Act.

Aimé Geoffrion K.C. for the Attorney-General for Canada, referred to *Brooks-Bidlake & Whittall, Ld.* v. *Attorney-General for British Columbia* (4), and *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (5)

After a short adjournment to consider the matter, LORD MAUGHAM L.C. said: Their Lordships have carefully considered the interesting point of practice, and they feel

(1) (1874) L.R. 2 H.L. Sc. 352.
(2) [1928] A.C. 475, 487.
(3) [1929] A.C. 260, 268.
(4) [1923] A.C. 450.
(5) [1924] A.C. 203, 211-2.

bound to tell counsel that they think that it would be contrary to the practice and usual procedure adopted by the Privy Council that the Board should express any opinion to His Majesty on a subject which really is no longer a practical one in any sense at all, and for that reason I may say that I regret that they will not hear counsel upon it, and the appeal will proceed only in respect of the Bank Taxation Bill.

Cyril Radcliffe K.C. followed. It is quite impossible for a Court to say that the tax in question is not to be raised as revenue for Provincial purposes, and that it is not within the legislative competence of the Provincial Legislature under s. 92 (2.) of the British North America Act, 1867. The scope and effect of a legislative measure is to be ascertained by an examination of its actual provisions, and it is only when expressions used in it are ambiguous or imprecise that reference may be made to extraneous material. A statute expressed in unambiguous and precise terms cannot properly be held invalid on the grounds that another statute of the same Legislature is invalid and that a common intention underlies both. There is no ground afforded either by the provisions of the Bill or by other matter which may properly be referred to for treating the Bill as ancillary to or dependent upon the Alberta Social Credit Act or any general scheme of legislation.

1939 A.C. p. 123.

[LORD THANKERTON referred to *In re The Regulation and Control of Aeronautics in Canada.* (1)]

Aimé Geoffrion K.C. and *J. Boyd McBride K.C.* for the Attorney-General for Canada. The Bank Taxation Bill is legislation in relation to banking, a subject-matter within the exclusive legislative competence of the Dominion Parliament. It is not "direct" taxation, or taxation "with-"in the Province" within the meaning of s. 92 (2.) of the British North America Act. The purpose and effect of the Bill may be looked at, and there is by it an extraordinary severe discrimination against the banks, and, moreover, a very big departure from the previous discriminating policy. Secondly, the amount of tax is so large that it indicates no intention to collect money, but an intention to exclude the banks. Thirdly, the logical policy of this legislation is to replace the ordinary Cana-

(1) [1932] A.C. 54, 71.

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dian banks by a Provincial State bank to operate its system of social credit. These cumulative effects demonstrate that the Bill is not in pith and substance taxation for Provincial purposes. In deciding whether the Bill is a good one conditions existing when it was passed may be looked at. The Bill and the Social Credit Act necessarily involved a combination against the banks. [Reference was made to *In re The Insurance Act of Canada* (1); *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2); and *Union Colliery Company of British Columbia, Ld.* v. *Bryden.* (3)]

J. Boyd McBride K.C. followed. The judgments below all state that the legislation was part of one scheme of legislation. There is a series of statutes designed to wipe out banks; another designed to establish credit houses. Having established that competitor, the next step was to make all those who were anxious to carry on business in the Province of Alberta deal with the particular credit system form of bank rather than with the banks authorized under Dominion legislation. Those are the three main points in this particular scheme. For that reason the Court below was justified in saying that there was a general scheme of legislation. That is not all. The next step was that nothing was to be allowed to be said in the Press which would be derogative to that particular scheme. It must be a scheme which nobody should be permitted to criticize—there was the muzzling of the Press. The last point in the general scheme is simply the wiping out of all bookkeeping debts and the starting of a new economic order. The legislation in question is part of a general scheme, and being ancillary, is ultra vires.

1939 A.C. p. 124.

W. N. Tilley K.C. and *B. V. McCrimmon* for the Chartered Banks of Canada. The tax is invalid because, among other reasons, taxing paid-up capital, reserve fund and undivided profits of banks transacting business throughout Canada and abroad carries the tax outside the Province. [Reference was made to *Bank of Toronto* v. *Lambe* (4), and *Brewers & Maltsters' Association of Ontario* v. *Attorney-General for Ontario.* (5)]

O. M. Biggar K.C. replied.

(1) [1932] A.C. 41, 52-3.
(2) [1931] A.C. 310, 317.
(3) [1899] A.C. 580, 584.
(4) 12 App. Cas. 575, 582.
(5) [1897] A.C. 231, 237.

H. P. Duchemin K.C. for the Canadian Press and Newspapers Associations.

J. L. Ralston K.C. for the Alberta Press.

July 14. LORD MAUGHAM L.C. stated that their Lordships were of opinion that the appeal should be dismissed.

Nov. 4. The reasons of their Lordships for dismissing the appeal were delivered by LORD MAUGHAM L.C. This is an appeal by the Attorney-General for Alberta from a judgment of the Supreme Court of Canada (Duff C.J., Cannon, Crocket, Davis, Kerwin and Hudson JJ.), dated March 4, 1938, on a reference to them by the Governor-General of Canada under s. 55 of the Supreme Court Act (Revised Statutes of Canada, 1927, c. 35). The subject of the reference and of this appeal is the power of the Legislature of the Province of Alberta to enact three Bills which had been presented to the Lieutenant-Governor of Alberta for assent on October 5, 1937, and reserved by him for the signification of the Governor-General's pleasure.

1939 A.C. p. 125.

By Order in Council, dated November 2, 1937, the Governor-General referred the following questions to the Supreme Court of Canada for hearing and consideration:—

"1. Is Bill No. 1, entitled 'An Act respecting the "'Taxation of Banks' or any of the provisions thereof "and in what particular or particulars or to what extent "intra vires of the Legislature of the Province of Alberta?"

"2. Is Bill No. 8, entitled 'An Act to amend and Con-"'solidate the Credit of Alberta Regulation Act' or any "of the provisions thereof and in what particular or "particulars or to what extent intra vires of the Legis-"lature of the Province of Alberta?"

"3. Is Bill No. 9, entitled 'An Act to ensure the Pub-"'lication of Accurate News and Information' or any of "the provisions thereof and in what particular or par-"ticulars or to what extent intra vires of the Legislature "of the Province of Alberta?"

By the judgment of the Supreme Court, dated March 4, 1938, the unanimous opinion of the Court on each of the three questions propounded was that it should be answered in the negative.

It is necessary to set out briefly the scope of the disputed Bills.

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Bill No. 1, entitled "An Act respecting the Taxation of "Banks."

This Bill applied to every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business and transacting such business in the Province. The Bill imposed upon every such bank an annual tax, in addition to any tax payable under any other Act, of (*a*) ½ per cent. on the paid-up capital, and (*b*) 1 per cent. on the reserve fund and undivided profits. Default on payment of tax was to be visited with penalties, and payment of either tax or penalty could be enforced by distress and sale of goods and chattels, or by action for civil debt. The tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province. It is important to note that the tax is calculated by reference to the whole of the paid-up capital and reserves made throughout Canada and abroad.

1939 A.C. p. 126.

Bill No. 8, entitled "An Act to Amend and Consolidate "the Credit of Alberta Regulation Act, 1937."

This Bill applied to "credit institutions," that is, persons or corporations whose business was that of dealing in credit. Such business was defined in the Bill. The Bill required credit institutions carrying on business in the Province to take out licences from the Provincial Credit Commission constituted by s. 4 of the Alberta Social Credit Act. Applications for licences were to be accompanied by an undertaking, signed by the applicant, to refrain from acting, or assisting, or encouraging any person to act in a manner which restricts or interferes with the property and civil rights of any person in the Province. A breach of this undertaking might be visited by the Provincial Credit Commission with suspension or revocation of the licence, subject to a right of appeal to the Social Credit Board constituted by the above-mentioned Social Credit Act.

Before a licence was granted to a credit institution, one or more Local Directorates were to be appointed to supervise, direct and control the policy of the institution's dealing in credit for the purpose of preventing any act constituting a restriction or interference with full enjoyment of property and civil rights by any person within

the Province. A Local Directorate was to consist of a majority appointed and removable by the Social Credit Board and a minority appointed and removable by the credit institution.

But it was expressly provided that no provisions of the Act should be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the Provincial Legislature.

Bill No. 9, entitled "An Act to ensure the Publication of "Accurate News and Information."

This Bill applied to newspapers or periodicals published in the Province. Where any such paper had published a statement relating to any policy or activity of the Provincial Government, the proprietor, editor, publisher or manager was to be bound, when so required by the Chairman of the Social Credit Board, to publish in the paper a statement of no greater length than, and of equal prominence and type with, the previous statement. The object of the chairman's statement was to be the correction or amplification of the previous statement, and it was to be stated that it was published by his direction. The Bill further provided that the proprietor, editor, publisher or manager of a paper should be obliged on requisition of the Chairman of the Social Credit Board to divulge the particulars of every source of information upon which any statement appearing in his paper was based.

1939 A.C p. 127.

Any contravention of the provisions of the Bill was liable to be punished by money penalties, and might entail the suspension of the paper or part of its material.

At the time when the three questions above stated were before the Supreme Court an Act entitled the Alberta Social Credit Act, c. 10, 1937 (First Session) was in force. It had received the assent of the Lieutenant-Governor of Alberta on April 14, 1937, and had been later amended by an Act assented to on August 6, of that year. The provisions of this Act, as amended, necessarily called for the careful examination of the Supreme Court, since the two Bills No. 8 and No. 9 could operate only if certain institutions created by and working under the Alberta Social Credit Act, i.e., the Provincial Credit Commission and the Social Credit Board, were in existence. Bill No. 8 required credit institutions carrying on business in the Province to

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obtain licences from the Provincial Credit Commission. That body, in the circumstances mentioned in the Alberta Social Credit Act, could suspend or revoke any licence, subject to a right of appeal to the Social Credit Board. As regards Bill No. 9, the Social Credit Board was entrusted with the most important duties under the Bill. It has happened, however, that since the order of the Supreme Court—namely, on April 8, 1938, the Alberta Social Credit Act was repealed by the Alberta Legislature (1938, c. 4). In these circumstances the two Bills No. 8 and No. 9 cannot now be brought into operation, and, since nothing can be done thereunder, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long-established practice of this Board to entertain appeals which have no relation to existing rights created or purported to be created; and their Lordships have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to Bills No. 8 and No. 9. Their Lordships, in taking this course, will only add that they do not intend to intimate any doubt as to the correctness of the decision of the Supreme Court as regards those Bills.

Bill No. 1, the "Act respecting the Taxation of Banks," is in a position different from that of the other two Bills. It contains no reference to the Alberta Social Credit Act. It purports to be concerned with taxation of a direct character, differing, however, from ordinary taxing statutes in that it singles out for taxation only banks which transact business in the Province. The word "bank" is defined as meaning "a corporation or joint stock company, other "than the Bank of Canada, wherever incorporated and "which is incorporated for the purpose of doing banking "business or the business of a savings bank and which "transacts such business in the Province whether the head "office is situate in the Province or elsewhere." No other body, corporation, institution or person is the subject of taxation under the Bill. It is sought to be justified by s. 92 (2.) of the British North America Act, 1867, as being within the class of subjects described as "Direct taxation "within the province in order to the raising of a revenue "for provincial purposes." It may be stated at the outset, if indeed it is not self-evident, that the mere fact that revenue to a greater or smaller amount would be raised in

the Province by a highly selective measure of this unusual character is not sufficient to justify it as coming within s. 92. Under the guise of discriminatory taxation in the Province it would be easy not only to impair, but even to render wholly nugatory, the exclusive legislative authority of the Dominion over a number of the classes of subjects specifically mentioned in s. 91 by making them valueless. Instances could be found in bills of exchange, and promissory notes, patents, and copyrights, which could be so heavily taxed as entirely to destroy their use as well as their value in the Province. A number of other illustrations could be given arising under s. 92 (10). No one would suggest—and certainly counsel for the appellant in his able argument did not—that Provincial legislation of this character would be valid. Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not *ultra vires* must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down: *John Deere Plow Co., Ld.* v. *Wharton* (1); *Great West Saddlery Co., Ld.* v. *The King* (2).

There are cases on each side of the line. For example, the decision of the Judicial Committee in *Russell* v. *The Queen* (3) is an authority on one side; the decisions in *Abbott* v. *City of Saint John* (4), *Forbes* v. *Attorney-General for Manitoba* (5), and *Judges* v. *Attorney-General of Saskatchewan* (6), may be cited on the other side. In the view of their Lordships these cases in no way conflict.

Admitting that a test applicable to every case of overlapping powers specified in ss. 91 and 92 is more than elusive, yet it is often comparatively easy to determine that the particular piece of legislation is an encroachment on a forbidden territory.

Some propositions may be stated that are not in dispute. Clearly, it is necessary in dealing with such a question to consider the whole scheme for distribution of powers contained in the two sections. The "classes of subjects" enumerated, looked at singly, overlap in many respects. It is obvious, for example, that currency, paper money,

(1) [1915] A.C. 330, 338, 339.
(2) [1921] 2 A.C. 91.
(3) (1882) 7 App. Cas. 829.
(4) (1908) 40 Can. S.C.R. 597.
(5) [1937] A.C. 260.
(6) [1937] 2 T.L.R. 464.

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patents, trade-marks and so forth are different kinds of property, and therefore as a matter of verbal definition within s. 92 (13.); but this occasions no logical difficulty, for, as has been repeatedly observed, the concluding paragraph of s. 91 declares that any matter coming within any of the classes of subjects enumerated in that section "shall "not be deemed to come within the class of matters of a "local and private nature" assigned exclusively to the Provinces. As pointed out in the judgment of Duff C.J. (concurred in by Davis J.), it is well established that if a given subject-matter falls within any class of subjects enumerated in s. 91, it cannot be treated as covered by any of those within s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); *Great West Saddlery Co., Ld.* v. *The King.* (2)

It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question, fairly considered, falls *prima facie* within s. 91 rather than within s. 92. The result of the comparison will not by itself be conclusive, but it will go some way to supply an answer to the problem which has to be solved.

The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Co. of British Columbia, Ld.* v. *Bryden.* (3) For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of s. 92 (2.), "Direct taxation within the province "*in order to the raising of a revenue* for provincial purposes" is sufficient in the present case to establish this proposition.

(1) [1896] A.C. 348. (2) [1921] 2 A.C. 91, 99.
(3) [1899] A.C. 580.

The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other: *Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *In re The Insurance Act of Canada.* (2) Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the Legislature, and, generally speaking, the speeches of individuals would have little evidential weight.

If these principles are borne in mind, it appears to their Lordships, as it appeared to the Supreme Court, that the specific question that arises in relation to the Bill No. 1 presents no serious difficulty. In the first place, it is plain that the taxation is aimed simply at banks, including savings banks; and by s. 91 (15.) and (16.) "banking" and "savings banks" are within the exclusive legislative authority of the Dominion. On the other hand, it is strange to find the Province singling out, "in order to the raising of a revenue for provincial purposes," banks and savings banks and no other wealthy corporation, body or persons in the Province.

Next, if the effect of the Bill is examined on the footing that it becomes operative in the Province, some remarkable facts emerge. As Kerwin J. (in a judgment concurred in by Crocket J.) observed (3):—"Our attention has been "called to the increase in the taxation of banks that would "be effected by the provisions of this Bill. As Provincial "legislation stood prior to the First Session of the Alberta "Legislature in 1937, the tax on all banks doing business "in the province amounted to $72,200 per annum. By "chapter 57 of that session a tax was imposed which would "increase the sum realised by $140,000 per annum. The "additional tax proposed by Bill 1 amounts to $2,081,925 "in each year."

(1) [1924] A.C. 328, 342. (2) [1932] A.C. 41.
(3) [1938] Can. S.C.R. 147.

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It does not seem to be necessary to set out the undisputed tables of figures showing the particulars of this gigantic increase in the taxation of banks within the Province. Their Lordships do not disagree with the Chief Justice and Davis J. that the facts are sufficient (1) "to "show that such a rate of taxation must be prohibitive "in fact and must be known to the Alberta Legislature "to be prohibitive." In coming to this conclusion it seems to their Lordships that the learned judges were justified in considering that the magnitude of the tax proposed for Alberta was such that, if it were applied by each of the other Provinces, it would have the effect of preventing banks from carrying on their businesses. It would be strange if each of the Provinces were successively to tax banks and the result on the question of ultra vires were to be that the Acts of those Provinces who were earliest in the field were valid, whilst the Acts of those who came a little later were to be held ultra vires. It must be remembered in this connection that the tax proposed is based on the paid-up capitals and on the reserve funds of the banks wherever situate.

It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a conclusion that the Bill is ultra vires. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive. If, however, any doubt could be entertained on the question of fact, there is in this case a further point which seems to their Lordships to be decisive.

In their opinion, it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question, including the attempt to create a new economic era in the Province. At the time when the Bill was passing through the Legislature the most profound and far-reaching changes in the operations of commerce, trade, and finance were intended by Bills before the Provincial Legislature and by Acts already passed. It was

(1) [1938] Can. S.C.R. 128.

plain that banks and savings banks operating in Alberta might greatly interfere with those proposed changes. The examination of the Province of Alberta Social Credit Act leaves little doubt that the Act was an attempt to regulate and control banks and banking in the Province. In the second 1937 session an Act called "The Credit of "Alberta Regulation Act" was passed. The recitals in that Act are as follows:—"Whereas the extent to which "property and civil rights in the Province may be enjoyed "depends upon the principles governing the monetization "of credit and the means whereby such credit is made "available to the Province and to the People collectively "and individually of the Province; and

"Whereas it is expedient that the business of banking "in Alberta shall be controlled with the object of attain-"ing for the People of Alberta the full enjoyment of property "and civil rights in the Province."

In the same session an Act entitled "An Act to pro-"vide for the Restriction of the Civil Rights of Certain "Persons" was passed, and it contains a similar recital. Both these latter Acts were part of the general scheme of social credit legislation in Alberta. Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely (1) "part of a legislative plan to "prevent the operation within the Province of those bank-"ing institutions which have been called into existence and "given the necessary powers to conduct their business by "the only proper authority, the Parliament of Canada." This is a sufficient ground for holding that the Bill is ultra vires.

There are other and narrower grounds on which the validity of Bill No. 1 has been attacked, but in view of the above conclusions it does not seem to be necessary to deal with them in any way.

Their Lordships think, however, that it may be useful to make some observations on the well-known and often cited decision of the Board in *Bank of Toronto* v. *Lambe* (2). That case seems to have occasioned a difficulty in the

(1) [1938] Can. S.C.R. 151. (2) 12 App. Cas. 575.

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minds of some of the learned judges in the Supreme Court. It must, however, be borne in mind that the Quebec Act in that case was attacked on two specific grounds, first, that the tax was not "taxation within the Province," and secondly, that the tax was not a "direct tax." It was never suggested, and there seems to have been no ground for suggesting, that the Act was by its effect calculated to encroach upon the classes of matter exclusively within the Dominion powers. Nor, on the other hand, was there any contention, however faint or tentative, that the purpose of the Act was anything other than the legitimate one of raising a revenue for Provincial needs.

It is, moreover, important to note that the taxes were not directed against a particular class of business or employment, but were imposed within the Province on every bank, insurance company, incorporated company carrying on any labour, trade or business in the Province, and on a number of other specified companies. Nor was it suggested that the taxation was of such a character that it might hamper the Dominion in exercising their powers under s. 91. In these circumstances, Lord Hobhouse, in delivering the judgment, refuted a contention on behalf of the appellants (1) in language which, as it seems to their Lordships, has sometimes been misunderstood. Its true meaning may be appreciated by stating in effect the argument to which it was addressed in the following form:—"A bank is an institution which comes within the words "of s. 91 (15.). To tax a bank with sufficient severity "would destroy it. Therefore the Province cannot tax a "bank at all." The answer of the Judicial Committee in substance was no more than this:—"You are asking the "Board to imply in s. 91 a proviso to the effect that if a "power expressly given to the Provinces is capable, by a "particular and unusual application, of infringing a power "given to the Parliament of Canada, then no similar use "of the Provincial power, however moderate, can be per-"mitted under any circumstances. The answer is that the "Legislature, in passing the British North America Act, "did not assume that a misuse of the Provincial powers "was likely to occur and accordingly had to be provided

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"for. No such proviso can therefore be implied." It was never laid down by the Board that if such a use was

(1) 12 App. Cas. 586-7.

attempted to be made of the Provincial power as materially to interfere with the Dominion power, the action of the Province would be intra vires. To quote the actual language of the Board, they said (1):—"If [the Judges] find "that on the due construction of the Act a legislative "power falls within s. 92, it would be quite wrong of them "to deny its existence because by some possibility it may "be abused, or may limit the range which otherwise would "be open to the Dominion parliament." This proposition is no more than what was stated in precise terms by Davies J. in *Abbott* v. *City of Saint John* when he observed (2): "Time and again the Judicial Committee have declined to "give effect to this anticipatory argument or to assume "to refuse to declare a power existed in the Legislature "of the Province simply because its improvident exercise "might bring it into conflict with an existing power of "the Dominion." Their Lordships are not aware of any decision of the Board which travels beyond the proposition laid down in *Lambe's* case (3) as explained above.

Their Lordships were invited to deal with the question of costs, but on the whole they did not think it right to depart from the usual practice which has obtained in deciding constitutional questions of the nature of those arising in this case.

The above were the reasons which influenced their Lordships in humbly tendering to His Majesty their advice to dismiss the appeal.

Solicitors for the appellant: *Blake & Redden.*

Solicitors for the Attorney-General for Canada and for the Alberta Press: *Charles Russell & Co.*

Solicitors for the Canadian Press and Newspapers Associations and for the Chartered Banks of Canada: *Lawrence Jones & Co.*

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(1) 12 App. Cas. 587. (2) 40 Can. S.C.R. 606.
(3) 12 App. Cas. 575.

J.C.* 1939 May 8.

[PRIVY COUNCIL.]

LADORE AND OTHERS.....APPELLANTS;

AND

1939 A.C. p. 468.

BENNETT AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Municipalities—Default in debenture issue—Financial difficulties—Statutory amalgamation of four municipalities—Scheme to meet debenture and other indebtedness—Validity of Amalgamating Acts and scheme—Relative to municipal institutions in the Province—Within legislative competence of Provincial Legislature—City of Windsor (Amalgamation) Act, S.O., 1935, c. 74—City of Windsor (Amalgamation) Amendment Act, S.O., 1936, c. 66—Ontario Municipal Board Act, S.O., 1932, c. 27, and 1935, c. 51, Part VI.—Department of Municipal Affairs Act, S.O., 1935, c. 16, Part III.—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (19.), (21.); s. 92 (8.).

By the City of Windsor (Amalgamation) Act, 1935, of the Ontario Provincial Legislature, four adjoining municipalities which were in financial difficulties and unable to meet their debenture interest and maturing principal, part of which was payable outside the Province, were amalgamated and incorporated as the City of Windsor, and by the City of Windsor (Amalgamation) Amendment Act, 1936, the Windsor Finance Commission, constituted under the principal Act with interim powers of administering the affairs of the new city, was abolished and its duties transferred to the Department of Municipal Affairs for Ontario. By the provisions of Part III. of the Department of Municipal Affairs Act, 1935, which was applied by the Amalgamation Act of 1935 to the new city and its affairs, and which reproduced the provisions, repealed in 1935, of Part VI. of the Ontario Municipal Board Act, 1932, the Ontario Municipal Board, if satisfied (inter alia) that a municipality had failed to meet its debentures or interest when due owing to financial difficulties affecting the municipality, was given power (inter alia) to order terms, conditions, places and times for exchange of new debentures for outstanding debentures, and to order postponement of or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon, and variation in the rates of such interest. A scheme having been formulated pursuant to those powers, and approved by the Ontario Municipal Board, for funding and refunding the debts of the amalgamated municipalities, under which (inter alia) former creditors of the old independent municipalities received debentures of the new city of equal nominal amount to those formerly held, but with the interest scaled down in various classes of debentures:—

1939 A.C. p. 469.

Held, that both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, were in pith and substance Acts passed in relation to "municipal institutions in the Province," and as such they, and the scheme formulated and approved thereunder, were intra vires of the Provincial Legislature under s. 92 (8.) of the British North America Act, 1867. The Provincial legislation in question did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. The Statutes were

* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD ROMER.

not directed to insolvency legislation; they picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affected rights outside the Province they only did so collaterally, as a necessary incident to their lawful powers of good government within the Province.

Judgment of the Court of Appeal for Ontario [1938] O.R. (C.A.) 324; [1938] 3 D.L.R. 212, affirmed.

APPEAL (No. 103 of 1938) from a judgment of the Court of Appeal for Ontario (May 17, 1938) affirming a judgment of Hogg J. (July 26, 1937).

The questions raised by this appeal by the plaintiffs arose out of the affairs of four adjoining municipalities in the Province of Ontario—the city of Windsor, the city of East Windsor, the town of Sandwich and the town of Walkerville. Before 1935 they were each an independent municipality exercising local government over their inhabitants. They had each of them raised loans for local purposes, amounting in the aggregate to many millions of dollars, which were represented by debentures. Those debentures were simple acknowledgments of debt and gave no charge upon municipal property. In the case of East Windsor some of them were made payable outside the Province of Ontario. By 1935 financial difficulties of the municipalities had become acute, and between October, 1931, and December, 1934, they had defaulted in payment of debenture interest and maturing principal. In December, 1934, by Order in Council a Royal Commission was appointed to inquire into the municipal and other local affairs of the four municipalities in question, particularly with regard to acts to be done and steps to be taken in connection with their amalgamation. The Commission reported in April, 1935, and their report disclosed a serious financial position, and something like a total default was threatened.

1939 A.C. p. 470.

With the materials in that report before them, the Government of the Province promoted in the Legislature an Act to amalgamate the four municipalities, c. 74 of 1935. The Act amalgamated them into one municipality, which was incorporated under the name of The Corporation of the City of Windsor. As from a named date the existing municipal corporations were dissolved. A special body, entitled the Windsor Finance Commission, was constituted, with interim powers of administering the affairs of the new city. By s. 6, sub-s. 1, of the Act, the Commission was to have and exercise the same rights, authorities, powers and duties as by the

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provisions of Part III. of the Department of Municipal Affairs Act, 1935, were conferred upon that department, and the provisions of Part III. were to apply to the new city. By the provisions of Part III. the Ontario Municipal Board, if satisfied (inter alia) that a municipality had failed to meet its debentures or interest when due owing to financial difficulties, was given power (inter alia) to order postponement of or variation in the terms, time and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness, and interest thereon, and variation in the rates of interest.

The Finance Commission by s. 7 (*c*) of the Amalgamation Act were to undertake the preparation and submission of a plan for funding and refunding the debts of the amalgamated municipalities upon the general basis that the debt of each of the amalgamated municipalities should be discharged by the imposition of rates upon the rateable property in that area of the new city which formerly comprised such municipality. In pursuance of the Act the Finance Commission prepared a plan for submission to the Ontario Municipal Board. In 1936, however, an amending Act was passed, which did away with the Windsor Finance Commission and transferred its duties to the Department of Municipal Affairs for Ontario. The plan prepared by the Finance Commission for funding and refunding the debt was taken under consideration by the Municipal Board. The scheme, generally, provided that former creditors should receive debentures of the new city of equal nominal amount to those formerly held, but the interest was scaled down in various classes of debentures. Arrears of interest were dealt with by paying a composition in cash.

1939 A.C. p. 471.

On April 29, 1936, the appellants, Edgar F. Ladore, Burley W. Bennett, Horace W. Cunningham and Harrie R. Dingwall, suing on their own behalf and on behalf of all other ratepayers and holders of debentures of the Town of Walkerville and of the Walkerville-East Windsor Water Commission, and on behalf of holders of debentures of other utilities commissions associated with the former municipalities, instituted the action out of which this appeal arose. The defendants were the members of the Finance Commission, the four municipal corporations which were amalgamated, the various Water and Hydro-Electric Commissions of those municipalities, the new Corporation of

the City of Windsor, the Windsor Utilities Commission, and the Attorney-General for the Province of Ontario. The plaintiffs claimed (inter alia) a declaration that the Amalgamation Acts were ultra vires of the Provincial Legislature; that the corporation created in pursuance of those Acts was not valid or subsisting; and a declaration that parts of the Ontario Municipal Board Act, 1932, and of the Department of Municipal Affairs Act, 1935, and amendments thereto, were also ultra vires. The relevant statutory provisions appear from the judgment of the Judicial Committee.

The trial judge (Hogg J.) dismissed the action, and his decision was affirmed by the Court of Appeal for Ontario (Latchford C.J.A., Masten and Henderson JJ.A.). The appeal is reported at [1938] O. R. (C. A.) 324; [1938] 3 D. L. R. 212.

1939. March 20, 21. *M. L. Gordon K.C.* and *Charles Sale* for the appellants. The City of Windsor (Amalgamation) Act, 1935, is somewhat ambiguous, but under it the new city which was created became, it is contended, responsible for all the debts of the former municipalities. The Windsor Finance Commission set up under that Act was to formulate a plan for refunding the debts of those municipalities, and one of the things which the Ontario Municipal Board (which superseded the Finance Commission pursuant to the provisions of the City of Windsor (Amalgamation) Amendment Act, 1936) could do under Part III. of the Department of Municipal Affairs Act, 1935, which Part was by the Amalgamation Act applied to the new city, was, in the case of a municipality, to cancel all the debentures which had been issued and replace them by other debentures bearing another rate of interest. Under what has been done in the present case interest has been cut down from six to one-and-a-half per cent. The first ground of the appellants' case against Part III. of the Department of Municipal Affairs Act, 1935, is that ss. 25, 31, 32, 33, 35 and 57 empower the Ontario Municipal Board and the Department of Municipal Affairs to override the provisions of the Dominion Interest Act (R.S.C., 1927, c. 102), which by s. 2 provides that: "Except as otherwise provided by this "or by any other Act of the Parliament of Canada, any "person may stipulate for, allow and exact, on any contract "or agreement whatsoever, any rate of interest or discount

1939 A.C. p. 472.

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"which is agreed upon." Every debenture issued by a municipal corporation or any of its local boards is a contract with the holder thereof to pay interest at the rate set out therein, and accordingly s. 2 of the Interest Act governs such interest stipulation. Sect. 33 of the Department of Municipal Affairs Act allows the exaction of only such rate of interest as the Ontario Municipal Board may authorize, but under head 19 of s. 91 of the British North America Act, 1867, the subject "interest" is within the exclusive legislative competence of the Dominion Parliament. All the provisions of Part III. of the Department of Municipal Affairs Act which deal with or authorize or empower the dealing or interference with agreed rates of interest are ultra vires the Provincial Legislature. The real matter to be

1939 A.C. p. 473.

decided is whether it can be said that, because the Provincial Legislature have the power under s. 92 (8.) of the British North America Act to deal with municipal institutions in the Province, they have the power to go right into s. 91 and deal with everything in that section; the question is whether the Ontario Legislature had power to authorize the refunding and reduction of interest, or whether it was only a Dominion concern. Questions of interest are specifically reserved to the Dominion Government. Sect. 33 (*g*) of the Department of Municipal Affairs Act, 1935, and the scheme, strike only at interest, and should be declared ultra vires. Every case, except one, which has been decided in Canada from the date of confederation has said that the Provincial Government have no power to deal with interest at all. If the power of dealing with interest is reserved for the Dominion Government, it is submitted that the Provincial Legislature cannot, by dissolving a municipality and creating another, change the rate of interest on the previously existing debentures. [Reference was made to *Royal Trust Co. (Shell Estate)* v. *Attorney-General for Alberta.* (1)]

Under the scheme the municipality have secured what is equivalent to a release from bankruptcy, because the former debentures have been cancelled. The whole scheme of legislation is ultra vires as being bankruptcy legislation, which by head 21 of s. 91 of the British North America Act is reserved exclusively to the Dominion Parliament. Where a Provincial Government incorporates a company, and the same would apply to municipal institutions, the body corporate will be

(1) [1937] 1 W. W. R. 376, 382.

subject to the law of the land—to the Dominion law and the Provincial law: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); but the right of the Province to legislate in regard to municipal institutions in the Province does not permit them to legislate in regard to any of the specific things reserved to the Dominion Legislature in s. 91 of the British North America Act: this was a dealing with municipal institutions in connection with bankruptcy and insolvency, and therefore outside Provincial powers. Part III. of the Department of Municipal Affairs Act, 1935, is bankruptcy legislation, and is almost identical with other Acts passed by the Dominion Government which have been declared intra vires: to be valid the Act in question should have been passed by the Dominion Parliament. The fact that the Dominion has not legislated on this point cannot be considered by the Board: *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia.* (2) The Province, in exercising its powers under s. 92 of the British North America Act, cannot encroach on the powers given by s. 91 to the Dominion: *Valin* v. *Langlois* (3); *Tennant* v. *Union Bank of Canada* (4); *John Deere Plow Co., Ld.* v. *Wharton* (5); and *Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (6) The Province cannot, by dealing with two subjects in one Act, obtain jurisdiction because one subject may be within their jurisdiction and the other without it: *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (7)

1939 A.C. p. 474.

The legislation in question deals with rights outside the Province—trade and commerce, bills and notes, and other matters, which are all reserved for the Dominion: *Royal Bank of Canada* v. *Rex.* (8) The Province cannot do indirectly what it cannot do directly: if the object of destroying or dissolving the corporation the Province has created is to affect matters outside the Province, it is outside the Provincial powers. If the result of the dissolution of the corporation materially affects rights outside the Province, it would be a question of degree whether the Province in dissolving the corporation had the question of those rights in mind as one of the objects to be effected: *Royal Bank of Canada* v. *Rex* (8);

(1) [1896] A.C. 348.
(2) [1898] A.C. 700, 714-5.
(3) (1879) 5 App. Cas. 115.
(4) [1894] A.C. 31, 45.
(5) [1915] A.C. 330, 337.
(6) [1931] A.C. 310.
(7) [1937] A.C. 377, 389.
(8) [1913] A.C. 283.

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1939 A.C. p. 475.

Ottawa Valley Power Co. v. *Hydro-Electric Power Commission* (1); *Beauharnois Light, Heat and Power Co., Ld.* v. *Hydro-Electric Power Commission of Ontario* (2); *Crédit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta* (3); and *Independent Order of Foresters* v. *Rex.* (4) The Province, for the purpose of discharging debts due outside the Province, cannot dissolve the corporation: a company incorporated in the Province may do business outside: *Bonanza Creek Gold Mining Co., Ld.* v. *Rex.* (5)

Interest, bankruptcy and insolvency, and rights outside the Province are matters absolutely excluded from the powers conferred on the Provincial Legislature by s. 92 of the British North America Act, 1867.

Charles Sale followed. In determining whether a municipality is subject to Part III. of the Department of Municipal Affairs Act, 1935, and, in effect, whether or not it is insolvent, the Municipal Board is exercising judicial functions, and it has no power to do so: *Toronto Corporation* v. *York Corporation.* (6) Similarly, in determining an application with respect to indebtedness they are exercising the same functions. [On the question of the costs of the Crown reference was made to *Beauharnois Light, Heat and Power Co., Ld.* v. *Hydro-Electric Power Commission of Ontario.* (7)]

J. H. Rodd K.C. for the respondents the Windsor Finance Commission, the City of Windsor and the Windsor Utilities Commission, and *J. C. McRuer K.C.* for the Attorney-General for Ontario were not called upon to argue.

May 8. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decision of the Court of Appeal of Ontario affirming a decision of Hogg J., who dismissed the plaintiffs' action. The plaintiffs claim was for a declaration that two statutes of Ontario providing for the amalgamation of certain municipalities in Ontario were ultra vires the Legislature of Ontario, and that the corporations created in pursuance of those statutes were not valid or subsisting, and a declaration that parts of other Ontario statutes, namely, the Ontario Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, and

(1) [1937] O. R. 265, 310, 329, 332.
(2) [1937] O.R. 796, 814-5, 821.
(3) [1937] 2 W. W. R. 353.
(4) [1939] 1 W. W. R. 275.
(5) [1916] 1 A.C. 566, 586.
(6) [1938] A.C. 415.
(7) [1937] O.R. 796, 823-4.

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amendments thereto, were also ultra vires. The plaintiffs also claimed further and alternative relief. The questions raised in the case arise out of the affairs of four adjoining municipalities, the city of Windsor, the city of East Windsor, the town of Sandwich and the town of Walkerville. Before the year 1935 they were each an independent municipality exercising local government over their inhabitants. They had each of them raised loans for local purposes, amounting in the aggregate to many millions of dollars, which were represented by debentures. These debentures were simple acknowledgments of debt and gave no charge upon municipal property. In the case of East Windsor some of them were made payable outside the Province of Ontario, that is to say, in Montreal, in the Province of Quebec, and in New York. Large amounts were held by holders resident outside the Province. Closely associated with the affairs of the municipalities were various public utility corporations, the Walkerville-East Windsor Water Commission, the Walkerville Hydro-Electric Commission, and the Essex Borders Utilities Commission, whose functions need not be particularly described. They had each issued debentures which, in the case of the Essex Borders Utilities Commission and of the Walkerville-East Windsor Water Commission, for instance, purported to create a charge upon properties named therein. These debentures were in many cases held by persons resident outside the Province. These commissions had all been incorporated pursuant to statutes of the Ontario Legislature. By 1935 financial difficulties of these municipalities and their commissions had become acute. In October, 1931, East Windsor defaulted in payment of debenture interest and maturing principal. In March and December, 1932, they were followed by Sandwich and the city of Windsor, and in December, 1934, by Walkerville. Meanwhile, in 1933, the Essex Borders Commission had defaulted, while in June, 1936, the Walkerville-East Windsor Water Commission stopped payment of interest. In December, 1934, by Order in Council, a Royal Commission was appointed to inquire into the municipal and other local affairs of the four municipalities in question, particularly with regard to acts to be done and steps to be taken in connection with their amalgamation. The Commission reported in April, 1935. In the Courts in Canada the report, when tendered in evidence by the plaintiffs, was objected to by the defendants,

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and the objection was upheld. Before the Board the objection was withdrawn, and by consent of both parties the report was placed before their Lordships. The report disclosed a serious financial position. Commercial conditions had so changed in recent years that, in 1934, 29 per cent. of the total population was, on a daily average, in receipt of relief. Assessments had fallen in value by 38 per cent. of the peak value in 1930; taxation was at breaking point, and something like total default was threatened. The provision for maintenance in every department was entirely inadequate, while, if adequate maintenance was received in existing conditions, the credit of the area, both public and private, would be destroyed. Neither public money for improvements nor mortgage money for private building would be obtainable, nor would present mortgages be renewable, unless under some form of Government compulsion.

1939 A.C. p. 477.

Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned, c. 74 of 1935, "an Act to amalgamate the City of East Windsor, "The Town of Walkerville, the City of Windsor and the "Town of Sandwich." The Act amalgamated the four municipalities into one municipality which was incorporated under the name of "The Corporation of The City of Windsor." As from a named date the existing municipal corporations were dissolved. A special body entitled the Windsor Finance Commission was constituted with interim powers of administering the affairs of the new city. By s. 6, sub-s. 1, it was to "have and exercise the same rights, authorities, powers "and duties as by the provisions of Part III. of the Depart- "ment of Municipal Affairs Act, 1935, are conferred upon the "said department," and the provisions of Part III. were to apply to the new city. The Finance Commission, by s. 7 *(c)*, were to "undertake the preparation and submission of a plan "for funding and refunding the debts of the amalgamated "municipalities, upon the general basis that the debt of "each of the amalgamated municipalities shall be discharged "by the imposition of rates upon the rateable property in "that area of the new city which formerly comprised such "municipality." As far as the public utility commissions were concerned, a new commission was constituted by s. 12,

1939 A.C. p. 478.

sub-s. 1, entitled "The Windsor Utilities Commission." Certain powers were confided to it by s. 12, sub-s. 1, and s. 16. The Essex Borders Utilities Commission, the Waterworks Commission and Hydro-Electric Commission of the amalgamated municipalities, including the Walkerville-East Windsor Water Commission, were dissolved and ceased to exist. In pursuance of the Act the Finance Commission prepared a plan for submission to the Ontario Municipal Board. In 1936, however, an amending Act [The City of Windsor (Amalgamation) Amendment Act, c. 66 of 1936] was passed which did away with the Windsor Finance Commission and transferred its duties to the Department of Municipal Affairs for Ontario. Sects. 5, 6, 7 and 9 of the principal Act were repealed. The plan prepared by the Finance Commission for funding and refunding the debt was taken under consideration by the Municipal Board. After formulating what appears to have been an interim decision in December, 1936, the Board heard objections from creditors and others, and eventually, on June 15, 1937, made an order, which had received the consent of the new city and the majority of creditors, approving the final scheme. It is unnecessary to state the details of the scheme: generally it may be said that the former creditors receive debentures of the new city of equal nominal amount to those formerly held, but the interest is scaled down in various classes of debentures. Arrears of interest were dealt with by paying a composition in cash. It is not quite clear whether the scheme derives its statutory power from the provisions of the Amalgamation Acts of 1935 and 1936 or from the provisions of Part III. of the Department of Municipal Affairs Act, 1935, or from both sources. It was prepared under s. 7 of the Amalgamation Act of 1935, but that section was repealed by the Act of 1936. It becomes necessary, in any case, to discuss the provisions of Part III. of the Department of Municipal Affairs Act, 1935, for that Part is attacked by the plaintiffs as invalid, and it is expressly applied by the Amalgamation Acts to the new city and its affairs.

1939 A.C. p. 479.

The Department of Municipal Affairs Act, 1935, is a general Act setting up a Department of Municipal Affairs whose duty it was to administer all acts in respect of municipal institutions and affairs. By an Act of the same date, an Act to amend the Ontario Municipal Board Act, 1932, 1935, c. 51, Part VI. of the Ontario Municipal Board Act, 1932,

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the heading of which is "Special Jurisdiction over Defaulting Municipalities" was repealed, and the Department of Municipal Affairs Act of 1935 contained in Part III. corresponding provisions under the same heading. In substance, the provisions are that if the Ontario Municipal Board is satisfied after request and upon inquiry that a municipality has failed to meet its debentures or interest when due, or failed to meet any of its other debts or liabilities when due, owing to financial difficulties affecting the municipality, or has, or may, become financially involved or embarrassed so that default or unusual difficulty in meeting debts or obligations may ensue (as amended by the Department of Municipal Affairs Amendment Act, 1936, c. 15, s. 5), the Board may exercise the special jurisdiction and powers conferred by the Act. The powers extend to control over all the affairs of the corporation (s. 27, sub-s. 2) and include, in s. 33, powers in respect to the debenture debt and debentures of the municipality, and interest thereon, and also other indebtedness. These powers include power to order *(a)* the consolidation of the whole or any portion; *(b)* issue of debentures in payment and satisfaction of the whole or any portion of such other indebtedness, and compulsory acceptance of such debentures in payment and satisfaction thereof; *(f)* terms, conditions, places and times for exchange of new debentures for outstanding debentures; *(g)* postponement of or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon and variation in the rates of such interest. It should be noticed that by s. 2 *(f)* of the Act, "municipality" includes any local board thereof; and by s. 2 *(b)* of the Ontario Municipal Board Act, 1932, "Local Board" includes any public utility commission. Counsel for the plaintiffs attacked the whole of the proceedings in connection with these municipalities on three grounds. He said that the relevant statutes and the authorities which they purported to give were ultra vires the Legislature of Ontario because they invaded the field of the Dominion as to: (1.) Bankruptcy and Insolvency (s. 91 (21.) of the British North America Act, 1867); (2.) Interest (s. 91 (19.)); and were not within the exclusive powers of the Province because (3.) they affected private rights outside the Province.

1939 A.C. p. 480.

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Before dealing with these contentions it is convenient to state that in the Courts in Canada objection was taken that the action which asks for declaratory relief was premature, inasmuch as the scheme of refunding the debts, which it is the object of the action to defeat, had not come into operation at the date of the writ. Before their Lordships this objection was wisely waived, as it was of importance to both parties to get a final decision on all the substantial points in issue.

It appears to their Lordships that the Provincial legislation cannot be attacked on the ground that it encroaches on the exclusive legislative power of the Dominion in relation to this class of subject. Their Lordships cannot agree with the opinion of Henderson J.A. that there is no evidence that these municipalities are insolvent. Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations. But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province: s. 92 (8.) of the British North America Act, 1867. Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions. If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the Provincial Legislature to provide the necessary remedy, so that the health of the inhabitants and the necessities of organized life in communities should be preserved. If corporation A or B or C is unable to function satisfactorily it would appear to be elementary that the Legislature must have power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation could be created by the Province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. The result of dissolution is that the debts of the dissolved corporation disappear. Amalgamation of municipalities for the purpose of more effective administration, whether for financial or other reasons, is a common incident of local government. It is necessarily accompanied

1939 A.C. p. 481.

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by an adjustment of financial relations. Where the former bodies are dissolved it is inevitable that the old debts disappear, to be replaced by new obligations of the new body. And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed. Efficient local government could not be provided in similar circumstances unless the Province were armed with these very powers, and if for strictly Provincial purposes debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the Province. They took for their debtor a corporation which at the will of the Province could lawfully be dissolved, and of its destruction they took the risk. That for the purpose of keeping control over municipal institutions the Legislature provided that a department of the Provincial government should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency. It is of the essence of its control over local government administered by municipalities that it should have these powers of inquiry and decision. In other words, the pith and substance of both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, are that the Acts are passed in relation to municipal institutions in the Province. They would also, so far as the public utility commissions are concerned, be justified as having been passed in relation to local works and undertakings under s. 92 (10.) of the British North America Act.

1939 A.C. p. 482.

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly—namely, to facilitate repudiation by Provincial municipalities of obligations incurred outside the Province. It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. But in the present case nothing has emerged even to suggest that the Legislature

of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that they deal with civil rights outside the Province, breaks down. The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the Province. 1939 A.C. p. 483.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear. Such legislation, if directed bona fide to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion Legislature over interest.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: *Lee & Pembertons.*

Solicitors for the members of the Windsor Finance Commission; the City of Windsor and the Windsor Utilities Commission; and for the Attorney-General for Ontario: *Blake & Redden.*

J.C.* 1940 Mar. 4. 1940 A.C. p. 513.

[PRIVY COUNCIL.]

BOARD OF TRUSTEES OF THE LETHBRIDGE NORTHERN IRRIGATION DISTRICT AND ANOTHER ..... } Appellants;

AND

INDEPENDENT ORDER OF FORESTERS ..... } Respondent.

ATTORNEY-GENERAL FOR CANADA .. Intervener.

THE KING ..... Appellant;

AND

INDEPENDENT ORDER OF FORESTERS ..... } Respondent.

ATTORNEY-GENERAL FOR CANADA .. Intervener.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada—Alberta—Legislation reducing interest on securities issued or guaranteed by the Province—In pith and substance "Interest" legislation—Ultra vires of Provincial Legislature—Provincially Guaranteed Securities Proceedings Act, S. A., 1937, *c.* 11—*Provincial Guaranteed Securities Interest Act, S. A.*, 1937, *c.* 12—*Provincial Securities Interest Act, S. A.*, 1937, *c.* 13—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (19.); *s.* 92 (8.), (13.), (16.).

The Provincial Guaranteed Securities Interest Act, c. 12 of the 1937 Statutes of Alberta, which purported to reduce by one-half the interest on certain securities guaranteed by the Province of Alberta, and the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, which purported to reduce the interest payable on securities issued by the Province to, in general, half the agreed rates, were in pith and substance Acts dealing with "interest" within the meaning of head 19 of s. 91 of the British North America Act, 1867, a subject-matter within the exclusive legislative competence of the Dominion Parliament, and the Acts were therefore ultra vires of the Provincial Legislature.

Ladore v. *Bennett* [1939] A.C. 468 referred to.

Day v. *Victoria (City)* [1938] 3 W. W. R. 161 approved.

1940 A.C. p. 514.

The Provincially Guaranteed Securities Proceedings Act, c. 11 of the Statutes of Alberta, 1937, which purported to prohibit any proceedings in Alberta for recovering directly or indirectly money due in respect of any guaranteed security without the consent of the Lieutenant-Governor in Council, was in fact, and so far as it applied to the subject-matter of this appeal, designed to effect the same purpose as the Provincial Guaranteed Securities Interest Act, c. 12 of 1937, namely, to reduce the rate of

* *Present:* Viscount Caldecote L.C., Viscount Sankey, Viscount Maugham, Lord Roche, and Lord Porter.

interest on the guaranteed securities, and must fall with the latter Act; it was an attempt to do by indirect means something which the Provincial Parliament could not do.

Dictum in *Madden* v. *Nelson and Fort Sheppard Ry.* [1899] A.C. 626, at p. 627, referred to.

Judgments of the Supreme Court of Alberta (Appellate Division) [1938] 3 D. L. R. 89; [1939] 2 D. L. R. 671, affirmed.

APPEALS (No. 107 of 1938 and No. 45 of 1939), heard together, the first from a judgment of the Supreme Court of Alberta (Appellate Division) (May 23, 1938), affirming a judgment of Ewing J. (October 29, 1937); the second from a judgment of the Supreme Court of Alberta (Appellate Division) (April 5, 1939), affirming a judgment of Shepherd J. (February 11, 1939).

The appeals raised the question whether the Provincially Guaranteed Securities Proceedings Act, in so far as it related to the subject-matter of the present appeal, the Provincial Guaranteed Securities Interest Act, and the Provincial Securities Interest Act, being respectively cc. 11, 12 and 13 of the Statutes of Alberta, 1937, were intra vires of the Provincial Legislature. The Provincial Guaranteed Securities Interest Act, c. 12 of 1937, by s. 3, purported to reduce the rate of interest payable on any security guaranteed by the Province of Alberta "notwithstanding any stipulation or "agreement as to the rate of interest payable" in respect of the security, to, for example, three per cent. in cases where the guaranteed security bore six per cent. interest. Sect. 3 of the Provincially Guaranteed Securities Proceedings Act, c. 11 of 1937, so far as it applied to the first appeal, purported to prohibit any action or proceedings of any kind for the recovery of any money payable "in respect of any guaranteed "security . . . . without the consent of the Lieutenant-"Governor in Council." The Provincial Securities Interest Act, c. 13 of 1937, also purported to provide for a reduction of the rate of interest payable in respect of any security issued by the Province, the new rates, in general, being half the agreed rates.

1940 A.C. p. 515.

In the first appeal the respondent, the Independent Order of Foresters, was the holder of a number of debentures, dated May 21, 1921, each for the principal sum of $1000, issued by the appellant, the Board of Trustees of the Lethbridge Northern Irrigation District, and guaranteed by the Province of Alberta. The debentures bore interest at the rate of six per cent. per annum. On May 11, 1937, the respondent

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presented the appropriate coupons for payment at the Imperial Bank of Canada in Toronto, but the Bank, acting on the instructions of the Government of the Province of Alberta, refused payment of the full amount of the interest. The respondent thereupon began the action out of which the first appeal arose to recover the interest due on the debentures. The appellant, in answer to the claim, relied on the Acts, cc. 11 and 12 of 1937.

In the second appeal the respondent owned a number of debentures to the amount of $373,000, lawfully issued by the Province of Alberta. The debentures, which were issued at different dates, bore rates of interest varying according to the conditions of the several debentures. The respondent, on presenting interest coupons from time to time, had been refused payment of interest at the agreed rates, and began the proceedings out of which the second appeal arose by way of petition claiming that the Act, c. 13 of 1937, was ultra vires the Alberta Legislature.

The facts and the relevant statutory provisions are stated more fully in the judgment of the Judicial Committee.

In the first case the trial judge (Ewing J.) declared that c. 12, and c. 11 in so far as it related to the subject-matter of the action, were ultra vires of the Legislature of the Province, and his judgment was affirmed by the Appellate Division (Harvey C.J.A., Lunney, McGillivray, JJ. A., and Shepherd J., Ford J.A. dissenting). The appeal is reported at [1938] 3 D. L. R. 89.

1940 A.C. p. 516.

In the second case the trial judge (Shepherd J.) held that c. 13 of the 1937 statutes was ultra vires of the Provincial Legislature, and the Appellate Division (Ford J.A., Tweedie and Howson JJ.) affirmed his decision. The appeal is reported at [1939] 2 D. L. R. 671.

1939. Dec. 11, 12, 13, 14. *D. N. Pritt K.C.* and *W. S. Gray K.C.* for the appellants in both appeals. It is suggested by the respondents, and has been held by the Courts below, that by reducing the interest the Province is breaking into a field of legislation reserved for the Dominion under head 19 of s. 91 of the British North America Act, 1867, and that therefore the Provincial legislation in question is ultra vires. [Reference was made to the British North America Act, 1867, ss. 91 and 92, and to cc. 11, 12 and 13 of the Statutes of Alberta, 1937.] Whenever the Court is faced with legislation

which seems to touch or infringe upon some parts of both ss. 91 and 92 the Court should approach the matter as follows: First, it must examine the legislation and arrive at a conclusion under what head of either section it really falls in pith and substance. In pith and substance is the present legislation about "property and civil rights in the Province," and therefore within legislative competence of the Province under head 13 of s. 92, or is it in pith and substance legislation about "interest," within the meaning of head 19 of s. 91? Secondly, if in pith and substance this legislation does come under some head of s. 91—in the present case, head 19—that is the end of the matter, and the statutes are invalid. Thirdly, if in pith and substance the legislation falls under some head of s. 92, then the statutes will be perfectly good notwithstanding that they in fact also impinge on matters falling within s. 91, subject to a very important qualification to be found in the fourth and next proposition, namely, that if the Provincial legislation thus prima facie valid is found to be in actual conflict with legislation of the Dominion which deals in pith and substance with a head under s. 91, and is therefore valid, then the Provincial legislation falls after all, wherever the conflict arises and irrespective of time. [In support of the above four propositions reference was made to *Citizens' Insurance Company of Canada* v. *Parsons* (1); *Hodge* v. *The Queen* (2); *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (3); *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (4); *Attorney-General for Ontario* v. *Attorney-General for Canada* (5); *John Deere Plow Co., Ld.* v. *Wharton* (6); *Canadian Pacific Wine Co.* v. *Tuley* (7); *Attorney-General for Ontario* v. *Reciprocal Insurers* (8); *Attorney-General for Canada* v. *Attorney-General for British Columbia* (9); *In re Insurance Act of Canada* (10); *Rex* v. *Arcadia Coal Co., Ld.* (11); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (12); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (13); and *Shannon* v. *Lower Mainland Dairy Products Board.* (14)

1940 A.C. p. 517.

(1) (1881) 7 App. Cas. 96.
(2) (1883) 9 App. Cas. 117.
(3) [1894] A.C. 189.
(4) [1907] A.C. 65.
(5) [1912] A.C. 571.
(6) [1915] A.C. 330.
(7) [1921] 2 A.C. 417.
(8) [1924] A.C. 328.
(9) [1930] A.C. 111.
(10) [1932] A.C. 41.
(11) [1932] 1 W. W. R. 771.
(12) [1937] A.C. 368.
(13) [1937] A.C. 377.
(14) [1938] A.C. 708.

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The Provincial Guaranteed Securities Interest Act, c. 12 of 1937, must, it is submitted, be said to come under head 8 (Municipal Institutions in the Province) or head 13 (Property and Civil rights in the Province) of s. 92. The real question is whether the legislation is deprived of the privilege of being classed as in respect of "property and civil rights" by being overridden by the other description of "interest." It is further said against the appellants that even if it is "property "and civil rights," it is not a right within the Province. To form an opinion whether c. 12 is in pith and substance legislation relating to "interest" under head 19 of s. 91, the Board will have to determine the exact scope of head 19 an of c. 12. It is contended that head 19 is designed to commit to the Dominion the right to legislate about "interest' only in a matter of general legislation of wide scope, and that it cannot be construed so as to affect rates of interest fixed in relation to purely Provincial contracts and obligations. To hold that head 19 gives the Dominion the sole right to legislate about "interest" and the public debt of a Province, or a debt guaranteed by a Province, would be to say something which is wholly inconsistent with the ordinary conception of Provincial sovereignty in matters which are essentially Provincial. Also, if the construction which has been adopted were allowed to prevail it would indeed invalidate a great deal of Provincial legislation on which no doubt has hitherto been thrown. If, however, head 19 is to be more restricted, then the true position is that c. 12 is legislation as to particular contracts within the head of "property and civil rights," that it does not in pith and substance relate to "interest," but is in respect of contracts laying down a condition of borrowing money.

If c. 12 be legislation dealing in pith and substance with "property and civil rights" it must then be considered whether it conflicts with s. 2 of the Dominion Interest Act, R.S.C., c. 102, which provides for freedom of contract in relation to interest. It is submitted, first, that s. 2 is ultra vires if it be construed so as to make it impossible for the Legislature of Alberta in respect of an Alberta contract to say that the agreed rate of interest on that contract shall not be collected, but only something less. Secondly, it is enabling legislation, enabling persons to make any agreement they like.

If the legislation is in respect of "property and civil rights," it is quite plainly an Alberta matter. In the Lethbridge appeal there was a loan by the Board of Trustees of an Irrigation District within the Province, borrowing money with a view to irrigating a section of the Province; the Board is set up by a Provincial Statute, and the Board's obligations are guaranteed by the taxpayers of the Province. The debtor is resident in Alberta, and the proper law of the contract was the law of Alberta. The elements against it being "property and civil rights in the Province" are these: it might be said that these being bearer bonds they must be treated as being within the jurisdiction where they are from time to time physicially present; or secondly, where they are payable. These are payable and can be presented to agents—bankers—in three Provinces and one Foreign country. The true position in Alberta is that there is not a single effective element in the matter to make this a civil right outside the Province of Alberta.

The only other submission about c. 12, apart from c. 11, is whether this legislation about the Irrigation Board can be said to be legislation about "municipal institutions in the "Province" within the meaning of head 8 of s. 92. It will depend entirely upon the view this Board take of "municipality"; if confined to pure Local Government Boards carrying out functions of government there would be a difficulty in the way of the appellants. On the other hand, if this Board regard "municipal" as covering many things that would be done by a Local Government Board, and that an institution carrying them out ought to be regarded as municipal, then the Board may perhaps be more with the appellants. It is submitted that *Ladore* v. *Bennett* (1) goes a long way to show that the appellant Board should be classed under "municipal institutions." There appears to be no authority as to what exactly is municipal; if it be a question of fact and degree the appellant Board has many features to be found in municipalities. A number of sections of The Irrigation Districts Act, R. S. A., 1922, c. 114, suggest that the institution is of a municipal character.

1940 A.C. p. 519.

On the question of the generality of the word "interest" in head 19, reference was made to *Ladore* v. *Bennett* (1) and to *Lynch* v. *The Canadian N. W. Land Co.* (2); the latter case

(1) [1939] A.C. 468, 482.

(2) (1891) 19 S.C.R. (Can.) 204, 212-14, 224-5.

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shows that "interest" has a relatively limited construction, and that the generality of head 19 is not to be carried too far. [Reference was also made to *Day* v. *Victoria* (*City*). (1)] Any Act which scales down the interest on a particular class of debts is not one relating to "interest"; no doubt it affects some interest, but it is a statute relating to certain contracts which the Legislature think ought to be made less onerous to one party and less advantageous to the other.

The next point is that if "interest" in head 19 of s. 91 be construed as the respondents suggest, such a construction would appear to invalidate a number of sections in such statutes as Judicature Acts, Partnership Acts and Limitation Acts, which have always in part seemed to deal with interest: R.S.O., 1937, c. 100, ss. 33, 34 and 35; R.S.A., c. 155, s. 26; and R.S.O., 1937, c. 243. There are two authorities which treat as perfectly valid Ontario Provincial legislation relating to interest: *Toronto Railway* v. *Toronto Corporation* (2); *Consolidated Distilleries, Ld., and W. J. Hume* v. *The King* (3). [Reference was also made to The Debt Adjustment Act of Alberta, 1937, c. 9; The Limitation of Actions Act of Alberta, 1938, c. 28, s. 3, sub-s. 1 (*f*); and to *Allen* v. *Trusts and Guarantee Co., Ld.* (*Poponoff Estate*). (4)] *Credit Foncier Franco-Canadian* v. *Ross and Attorney-General for Canada* (5) shows that legislation of the present type is in relation to "property and civil rights"; see also *Day* v. *Victoria* (*City*) (6); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (7); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (8); and *Independent Order of Foresters* v. *Board of Trustees of Lethbridge Northern Irrigation District*. (9) Remembering that the head "property "and civil rights in the Province" has been treated fairly widely by this Board and in the Courts in Canada, and remembering, too, that if it is not so treated it becomes almost impossible for a Province to legislate upon any matter of Provincial importance, the Courts, if they are going to be very strict about the Province putting their hand across the Provincial boundary line, are going to make it practically impossible for the Provinces to deal with their economical development. Nothing can be more

(1) [1938] 3 W.W.R. 161, 177.
(2) [1906] A.C. 117, 121.
(3) [1932] S.C.R. (Can.) 419.
(4) [1937] 2 W.W.R. 257.
(5) [1937] 2 W.W.R. 353.
(6) [1938] 3 W.W.R. 161, 185.
(7) [1937] A.C. 391.
(8) [1929] A.C. 260, 268.
(9) [1937] 2 D.L.R. 109.

essentially Provincial than in the one case a debt of the Province, and in the other the debts guaranteed by the Province; what the Board is really faced with, therefore, is a group of civil rights, and the only elements which are to be found without the Province are that many people outside the Province hold the securities, and the agents who make the payments may be outside the Province. Two elements in considering the location of these civil rights are (*a*) what is the proper law of the contract; and (*b*) can you be sued outside the Province in such a way as to bind you within the Province on these obligations? If the contracts are not governed by the law of Alberta they have to be governed by four or five different jurisdictions. The real solid location of all these debentures is where the debtor resides: *Mount Albert Borough Council* v. *Australian Temperance and General Mutual Life Assurance Society* (1); *Lynch* v. *The Canada N.W. Land Co.* (2); and *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (3) With regard to the question of enforcement, if a judgment were obtained by default against the appellants in another Province, and no property was found there, and thereupon the respondent repairs to Alberta with that judgment, the appellants would not be bound there by that judgment as a judgment: Dicey's Conflict of Laws, 5th ed., p. 991, Note 29. It would be sufficient for the respondent to say that this is "property and civil rights within the Province," and it would not matter if it is also property without the Province: *Royal Bank of Canada* v. *The King.* (4)

If the argument on c. 12 prevail, then c. 11 need not be considered. If it does become necessary to adjudicate on it, the Board are faced with this problem: Can the Legislature of a Province which has entrusted wholly to its care "the "administration of justice in the Province," including "pro- "cedure in civil matters" in the Courts (head 14 of s. 92), have control over the proceedings in its Courts? and the appellants seek to say that just as by legislation the Province can impose limitation and other conditions that are reasonable on the litigious activities of their citizens, so, if anyone wishes to bring any proceedings in relation to these guaranteed securities he must apply to the Government, that is,

(1) [1938] A.C. 224, 244.
(2) (1891) 19 S.C.R. (Can.) 204, 217.
(3) [1920] A.C. 184.
(4) [1913] A.C. 283, 293, 297.

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the Lieutenant-Governor in Council, for consent to bring the action. Chapter 11 does not say a word about interest; it merely imposes a bar or a stop of a known kind on a particular class of litigation: *Ottawa Valley Power Co.* v. *Attorney-General for Ontario.* (1) On the question whether motive may be gone into, see Beal's Cardinal Rules of Legal Interpretation, 3rd ed., pp. 315, 417; *City of Fredericton* v. *The Queen* (2); and *Re Alberta Legislation.* (3)

With regard to the Provincial Securities Interest Act, c. 13 of 1937, the subject-matter of the second appeal, every argument that has been adduced to support c. 12 also supports c. 13, except that dealing with "municipal institutions." It is submitted that if the position is reached where the question of the conflict between the Interest Act and c. 13 has to be faced, the Board are entitled to say that the Crown is not bound by the Interest Act: *In re Silver Brothers, Ld.* (4) Further, it is submitted that the appellants can succeed in the second appeal on c. 13 by claiming to come under head 3 of s. 92, "the borrowing of money on "the sole credit of the Province," and that c. 13 is in pith and substance legislation in that sense, and not in respect of "interest"; a more specific power given in s. 92 can get more force of operation than a general power in s. 91: *Great West Saddlery Co.* v. *The King* (5); *Dominion Building Corporation* v. *The King.* (6)

G. H. Steer K.C., *Frank Gahan* and *R. Bigelow* for the resondents in both appeals, were not required to deal with the question of "interest" under head 19 of s. 91, but only with cc. 11 and 13 of the 1937 Statutes of Alberta. It is submitted that c. 13, as well as c. 12, is "interest" legislation. The principle is that if a matter comes in pith and substance within a head of s. 91—and it is contended that cc. 12 and 13 do come within head 19—it cannot possibly come under any head of s. 92—"property and civil rights," "municipal "institutions," or "borrowing money on the sole credit of "the Province"—and the fact that it might in some aspects be regarded as coming within s. 92 makes no difference: *Union Colliery Company of British Columbia* v. *Bryden.* (7)

(1) [1936] 4 D.L.R. 594.
(2) (1880) 3 S.C.R. (Can.) 505, 532.
(3) [1938] 2 D.L.R. 81; [1939] A.C. 117, 130.
(4) [1932] A.C. 514, 521.
(5) [1921] 2 A.C. 91, 116.
(6) [1933] A.C. 533, 548-9.
(7) [1899] A.C. 580, 587.

Further, if Provincial legislation is in conflict with valid Federal legislation, whether that Federal legislation is valid because it comes in pith and substance within a head of s. 91, or because it is necessarily incidental to matters coming within s. 91, then even that necessarily incidental legislation coming into conflict with Provincial legislation must prevail: *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1); *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers* (3); and *Attorney-General for Alberta* v. *Attorney-General for Canada.* (4) If c. 11 is examined in the light of the above propositions it is submitted that it is "interest" legislation just as clearly as cc. 12 or 13, because it is inseparably connected with c. 12. The only application which c. 11 can have is to a guaranteed security, defined in c. 11, and defined in exactly the same way in c. 12. The object and purpose of c. 11 is to give full effect to c. 12, by precluding a person, who feels that c. 12 does not stand in his way, from exercising his fundamental right to ask the Court to determine his rights under s. 12.

Further, if c. 11 is not "interest" legislation, it is a colourable device to prevent a person obtaining the interest to which he is entitled by virtue of the Interest Act of Canada. That sort of colourable device will not be allowed to prevail: *Madden* v. *Nelson and Fort Sheppard Ry.* (5) It is impossible for a Provincial Legislature to deny access to the Courts to a subject for the purpose of determining such questions as are involved in this appeal.

1940 A.C. p. 523.

With regard to head 3 of s. 92—"borrowing on the sole "credit of the Province"—it is submitted that the British North America Act has authorized the Province of Alberta to make a contract with respect to the borrowing of money, and that once that contract has been made it is in no different category from any other contract; that the Crown is bound by its contract, and that whatever rights a private citizen would have in respect of the limitation or repudiation of his contract the Crown would have, and no more. Once the Province has entered into a contract with the lender, head 3 of s. 92 has fulfilled its full purpose, and gives no further power to the Provincial Legislature. Once that contract

1940 A.C. p. 524.

(1) [1894] A.C. 189, 200.
(2) [1930] A.C. 111, 118.
(3) [1924] A.C. 328, 336-341.
(4) [1939] A.C. 117, 128-131.
(5) [1899] A.C. 626, 627-8.

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has been made it becomes "property and civil rights," and it is either within or without the Province. If it is within the Province the Province has jurisdiction over it; if it is out of the Province it has no jurisdiction. The Province has no jurisdiction in this case because both the property that is created by these bonds and the civil right of enforcing the bonds in question here are outside the Province of Alberta. There is no question of severability: *Attorney-General* v. *Bouwens* (1); *Ottawa Valley Power Co.* v. *Attorney-General for Ontario*. (2) There is no difficulty in respect of a series of bonds with regard to their situs; the bonds in suit have a situs in the Province of Ontario, and that being so, the Province of Alberta has no jurisdiction over them because of the limited jurisdiction in s. 92 in respect of property and civil rights "within" the Province. The present case is stronger than *Royal Bank of Canada* v. *The King*. (3) [Reference was also made to Canada's Federal System, by Lefroy, pp. 506-9.] The power to enact legislation with respect to Provincial borrowing does not give any rights whatever to the Province to legislate with regard to a debt which has been created by this borrowing; that debt is created by an ordinary contract, and that contract must be controlled by the ordinary law, subject to any rights of the Crown that may be involved.

The question whether the Interest Act of Canada applies to the Crown in the right of the Province of Alberta is of no importance here if the Board come to the conclusion that c. 13 is "interest" legislation. The English rule is that the Crown shall not be bound by a statute unless named in it. The situation in Canada is quite different, because the whole question is controlled by the Interpretation Act, R.S.C., 1927, c. 1, s. 16: there has got to be a right of the Crown affected, and to the detriment of the Crown: *In re Silver Brothers, Ld.* (4) It is submitted that s. 2 of the Interest Act simply confers a benefit on the Crown in the sense that the Crown can make a bargain in respect of interest in exactly the same way as any subject can enter into such an obligation; it has no effect whatever on any right of the Crown. It was decided in *Dominion Building Corporation* v. *The King* (5) that notwithstanding the interpretation of s. 16 of the

1940 A.C. p. 525.

(1) (1838) 4 M. & W. 171.
(2) [1936] 4 D.L.R. 594.
(3) [1913] A.C. 283.
(4) [1932] A.C. 514, 523.
(5) [1933] A.C. 533, 547-9.

Interpretation Act a law of the Province of Ontario which did not prejudicially affect the rights of the Crown was applicable to the Crown's contract. There is no right of the Crown which is affected prejudicially or otherwise by s. 2 of the Interest Act, and it is submitted that that section is applicable to the contracts of the Crown.

Frank Gahan for the Attorney-General for Canada, intervener in both appeals, adopted the argument for the respondents in the appeals. With regard to the attempt to justify c. 11 as being "administration of justice," in other words the argument that under head 14 of s. 92 it is open to the Province to pass a law which requires somebody's consent before the person on whom the Dominion has conferred a right can come to the Court, it is submitted that it is the duty of the Province to secure the enforcement of Dominion rights, and that any attempt by the Province to prevent the enforcement of these rights is ultra vires of the Provincial Legislature: *In re Chief Justice of Alberta. Scott* v. *Attorney-General for Canada* (1); *Walker* v. *Walker* (2); *John Deere Plow Co., Ld.* v. *Wharton* (3); *Great West Saddlery Co.* v. *The King* (4); and *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (5) Chapter 11 is inapplicable to bar a Dominion right, and therefore inapplicable to this case, or by reason of its attempt to bar a Dominion right it is bad in toto; it has cast the net too wide, and therefore, even if it stood alone, it is bad legislation.

D. N. Pritt K.C. replied, and referred to *Lymburn* v. *Mayland.* (6) 1940 A.C. p. 526.

1940. Mar. 4. The judgment of their Lordships was delivered by VISCOUNT CALDECOTE L.C. These two appeals raise questions of the validity of three Acts of the Legislative Assembly of the Province of Alberta, all passed on April 14, 1937. In the first appeal the Provincial Guaranteed Securities Interest Act, c. 12 of the Statutes of Alberta, 1937, and the Provincially Guaranteed Securities Proceedings Act, c. 11 of the Statutes of Alberta, 1937, in so far as it relates to the subject-matter of the proceedings under appeal, have been declared ultra vires by the Appellate Division of the Supreme Court of Alberta dismissing an

(1) [1923] 2 W.W.R. 929, 936.
(2) (1919) 48 D.L.R. 1, 7, 9. A.C. 1940.
(3) [1915] A.C. 330.
(4) [1921] 2 A.C. 91, 98.
(5) [1929] A.C. 260.
(6) [1932] A.C. 318.

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appeal from a judgment of Ewing J., dated October 29, 1937. In the second case the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, has likewise been declared ultra vires the Legislature of the Province as the result of a decision of the Appellate Division dismissing an appeal from a judgment of Shepherd J., dated February 11, 1939. Similar questions arise in the two appeals as to the interpretation of ss. 91 and 92 of the British North America Act, and they were heard together. It is necessary now to deal with the two cases separately.

The respondent in the first appeal (the plaintiff in the action) is the holder of a number of debentures, dated May 21, 1921, each of the principal sum of one thousand dollars, issued by the first-named appellant, and guaranteed by the Province of Alberta. The debentures bore interest at the rate of six per cent. per annum, payable half-yearly, in gold coin of, or equivalent to, the standard of weight and fineness fixed for gold coins at the date of the debentures by the laws of the United States of America, upon presentation and surrender of the coupons attached to the debentures, as the coupons severally became payable. The debentures provided that payment of interest should be made at the holder's option at the principal office of the Imperial Bank of Canada in Toronto, Montreal or Edmonton, or at the office of the Bank of Manhattan Company in New York.

1940 A.C. p. 527.

On December 15, 1936, the respondent presented for payment at the Imperial Bank of Canada, in Toronto, coupons attached to the debentures, and dated November 1, 1936, for thirty dollars each, being in respect of interest at the rate of six per cent. The Bank, acting on the instructions of the Government of the Province of Alberta, refused payment of the amount of the coupons except to an amount representing interest at the rate of three per cent. The respondent thereupon took proceedings in the Supreme Court of Alberta to recover the full amount of the interest. The first-named appellant met the claim by relying on the provisions of the Provincial Securities Interest Act, c. 11 of the Statutes of Alberta, 1936 (Second Session), reducing the interest payable on the debentures from six per cent. to three per cent., and prohibiting any action from being brought or maintained in the Courts of the Province in respect of the debentures. At the trial of the action the Act relied on by the first-named appellant was held by Ives J. to be ultra

vires the Legislature, and judgment was given for the amount claimed. Notice of appeal was given, but before the appeal was heard the two Acts in question in the present appeal were passed by the Legislative Assembly, and by s. 5 of the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, the Provincial Securities Interest Act, c. 11 of the Statutes of Alberta, 1936 (Second Session), was repealed. A few days later the appeal from the judgment of Ives J. was abandoned.

On May 1, 1937, a further amount of interest became payable, and on May 11, the respondent presented the appropriate coupons for payment at the Imperial Bank of Canada, in Toronto. The Bank again, on the instructions of the Government of the Province of Alberta, refused payment of the full amount of the interest. The respondent thereupon began the action out of which the present appeal arises to recover the interest due on the debentures. The first-named appellant in answer to the claim relied on the Act, c. 12 of the Statutes, 1937, by which the interest due at the rate of six per cent. was reduced to three per cent., and also on the Act, c. 11 of the Statutes, 1937, as a bar to the action without the consent of the Lieutenant-Governor in Council. The question in this appeal is whether these two Acts are within the powers of the Provincial Legislature having regard to the provisions of ss. 91 and 92 of the British North America Act, 1867, by which the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures was made.

The Act, c. 12 of 1937, effects its object in simple and straightforward language. After defining guaranteed securities so as to include (inter alia) the debentures concerned in this appeal, the Act proceeds by s. 3 to reduce the rate of interest payable upon any guaranteed security from and after June 1, 1936, "notwithstanding any stipulation or agreement as to "the rate of interest payable" in respect of the security. In order to bolt the door more firmly against a holder of any guaranteed security who might wish to test his rights in the Courts of the Province, it is provided by s. 3, sub-s. 2, that "no person shall be entitled to recover "in respect of any guaranteed security any interest at a "higher rate than the rate" prescribed by the Act, and the rights of the holder of a guaranteed security are stated to be such as are set out in the Act. The Act, c. 11 of 1937,

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1940 A.C. p. 529.

carries the alteration of the rights of the debenture holder a little further. Sect. 2 defines "guaranteed securities" as in the Act, c. 12. Sect. 3, which is the only operative section of the Act, prohibits any action or proceeding of any kind for the recovery of any money payable "in respect "of any guaranteed security, or for the purpose of enforcing "any right or remedy whatsoever for the recovery of any "such money, or for the purpose of enforcing any judgment "or order at any time heretofore or hereafter given or made "with respect to any guaranteed security, or for the purpose "of enforcing any foreign judgment founded on a guaranteed "security, without the consent of the Lieutenant-Governor "in Council."

The validity of these two Acts depends upon the interpretation and application of ss. 91 and 92 of the British North America Act of 1867. These sections have been the subject of repeated examination in the Judicial Committee, and there can no longer be any doubt as to the proper principles to their interpretation, difficult though they may be in application. Lord Haldane, in delivering the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (1) said: "The rule of construction is that general "language in the heads of s. 92 yields to particular expres- "sions in s. 91, where the latter are unambiguous." In a later decision of the Judicial Committee, *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2), Lord Tomlin summarized in four propositions (3) the result of the earlier decisions of the Board on questions of conflict between the Dominion and the Provincial Legislatures. The first proposition is to the effect that the legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by s. 92. Lord Tomlin referred to *Tennant* v. *Union Bank of Canada* (4) as the authority in this statement. In applying these principles, as their Lordships propose to do, to the present case, an inquiry must first be made as to the "true nature and "character of the enactments in question" (*Citizens Insurance Co. of Canada* v. *Parsons* (5)), or, to use Lord Watson's

(1) [1921] 2 A.C. 91, 116.
(2) [1930] A.C. 111.
(3) Ibid. 118.
(4) [1894] A.C. 31.
(5) (1881) 7 App. Cas. 96.

words in delivering the judgment of the Judicial Committee in *Union Colliery Company of British Columbia* v. *Bryden* (1), as to their "pith and substance." Their Lordships now address themselves to that inquiry.

The long title of the Act, c. 12 of 1937, is "An Act respecting the interest payable on debentures or other securities guaranteed by the Provinces." The sole purpose and effect of the Act are to reduce the rate of interest on a number of securities. The holders of the securities affected by the Act were entitled, before the Act was passed, to receive interest at a rate according to the terms on which their securities were issued. The Act substituted a different rate of interest for the agreed rate. The Act clearly deals with interest, and "interest" is one of the classes of subject which by s. 91 are reserved exclusively for the Dominion Legislature. Unless, therefore, a restricted interpretation is to be given to "interest" in s. 91 (19.) instead of its ordinary meaning, it would appear on a first examination that the Act, c. 12, is not within the competence of the Province. Their Lordships, however, were invited by counsel for the appellants to say that the inclusion of "interest" in the Dominion subjects in s. 91 is to be explained by the history of earlier legislation on the subject of usury, and therefore "interest" must be read as meaning only interest which is exorbitant or usurious. This interpretation is open to the objection that as no standard is laid down by which interest is to be adjudged exorbitant or usurious, "interest" standing as it does in s. 91 without any word of qualification or limitation would seem a very uncertain description of a class of subject for the purpose of defining the exclusive legislative authority of the Dominion. Their Lordships' attention was called to s. 4 of the Dominion Interest Act of 1927 (R.S.C., c. 102) by which no interest exceeding the rate of five per cent. per annum shall be chargeable unless the contract contains an express statement of the yearly rate of interest. Legislation of this sort was said by counsel for the appellants to be akin to legislation dealing with usury. Their Lordships would be slow in forming this opinion, but even if it were so, it carries the argument no further. The Dominion Parliament in exercising the power to legislate upon "interest" might very well include in an Act dealing generally with the subject of

(1) [1899] A.C. 580.

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interest provisions to prevent harsh transactions. Nor does the history of legislation in Canada on the subject of interest support the appellants' argument. Their Lordships' attention was called to a number of Canadian Acts of Parliament on the subject of usury from 1793 down to 1858. In 1858 an Act was passed by the Parliament of Canada (c. 85) which was the forerunner of the Interest Act of 1927 of the Dominion. The Act of 1858, by s. 2, in effect abolished restrictions as to rates of interest, except in the case of certain persons named in the Act. From that time forward the usury laws, which the policy of an earlier generation demanded, ceased to have effect. Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of head 19 of s. 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt to lay down any exhaustive definition of "interest." The word itself is in common use, and is well understood. It is sufficient to say that in its ordinary connotation it covers contractual interest, and contractual interest is the subject of the Act now in question.

For these reasons their Lordships have come to the conclusion that the Act, c. 12 of Alberta, 1937, is in pith and substance an Act dealing with "interest" within the meaning of s. 91, (19.) of the British North America Act. Having regard to this conclusion, it becomes unnecessary to discuss at length the classes of subjects enumerated in s. 92 as being within the powers of Provincial Legislatures. It was suggested on behalf of the appellants that the Act in question is legislation concerning "Municipal Institutions in the Province" (head 8), or concerning "property and civil rights in the Province" (head 13), or, failing these, that the Act fell under head 16, "generally all matters of "a merely local or private nature in the Province." Their Lordships are unable to accept any of these contentions. In so far as the Act in question deals with matters assigned under any of these heads to the Provincial Legislatures, it still remains true to say that the pith and substance of the Act deals directly with "interest," and only incidentally or indirectly with any of the classes of subjects enumerated in s. 92. Even if it could be said that the Act relates to classes of subjects in s. 92, as well as to one of the classes in s. 91, this would not avail the appellants to protect the

Provincial Act against the Interest Act of 1927, passed by the Dominion Parliament, the validity of which, in the view of their Lordships, is unquestionable. Sect. 2 of the Interest Act is as follows: "Except as otherwise provided by "this or by any other Act of the Parliament of Canada, any "person may stipulate for, allow and exact, on any contract "or agreement whatsoever, any rate of interest or discount "which is agreed upon." This provision cannot be reconciled with the Act, c. 12 of Alberta, 1937, and, as Lord Tomlin made clear in the case already cited of *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), Dominion legislation properly enacted under s. 91 and already in the field must prevail in territory common to the two Parliaments.

Their Lordships were pressed with the decision of the Board in *Ladore* v. *Bennett*. (2) In that case a Provincial Legislature passed Acts amalgamating and incorporating in one city four municipalities which were in financial difficulties. As part of the consequent adjustment of the finances of the municipalities, debentures of the new city of equal nominal amount to those of the old municipalities were issued to the creditors, but with the rate of interest reduced. It was held by the Judicial Committee that a Provincial Legislature, which could dissolve a Municipal Corporation and create a new one to take its place, could legislate concerning the financial powers of the new corporation, and incidentally might define the amount of interest which the obligations incurred by the new city should bear. On this ground it was decided that legislation directed bona fide to the creation and control of municipal institutions is in no way an encroachment upon the general exclusive power of the Dominion Legislation over interest. Having come to the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under s. 92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new city was not an invasion of Dominion powers under head 19 of s. 91.

1940 A.C. p. 532.

The decision of the Court of Appeal of British Columbia in *Day* v. *Victoria* (*City*) (3) holding the Victoria City Debt

(1) [1930] A.C. 111. (2) [1939] A.C. 468.
(3) [1938] 3 W.W.R. 161.

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Refunding Act, 1937, intra vires of the Provincial Legislature, was also cited as a case in which it was held permissible for a Provincial Legislature to pass an Act relating to interest. On examination, the decision is found to give no support to the appellants' argument. The Act there in question did not purport to be an Act relating generally to "interest," and while some of its provisions dealt with interest as an incident effecting the general object of the enactment, it was held, rightly as their Lordships think, not to be an Act in relation to "interest," or to conflict with the Dominion Interest Act. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), which was also cited, the question was whether Acts of the Dominion Parliament dealing with the liabilities of farmers and with creditors' arrangements came under head 21 of s. 91 of the British North America Act "Bankruptcy and insolvency", or head 13 of s. 92, "Property and civil rights in the "Province." The Judicial Committee held that the Acts in question related to "bankruptcy and insolvency." The case is one more illustration of the rule that, in resolving the questions that are bound to arise between these two famous sections of the British North America Act, is it essential first to examine the "true nature and character" of the legislation in question.

1940 A.C. p. 533.

The Act, c. 11 of 1937, prohibiting actions or proceedings to enforce rights with respect to guaranteed securities without the consent of the Lieutenant-Governor in Council must, in their Lordships' judgment, stand or fall with the Act, c. 12. Each of the two Acts applies to "guaranteed "securities" as defined in identical terms. The Acts are in fact designed to effect one and the same purpose, namely, to reduce the rate of interest on the securities to the level fixed by the Act, c. 12. If the Act, c. 11, can properly be passed as relating to one or other of the classes of subjects in s. 92, it enables the Government of Alberta, acting through the Lieutenant-Governor in Council, to allow proceedings in the courts to recover interest at the rate which the Government fix, but at no higher rate. By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Act, c. 12. In other words, the Act, c. 11, is an attempt to do by indirect means something which their Lordships are satisfied the

1940 A.C. p. 534.

(1) [1937] A.C. 391.

Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of ss. 91 and 92. Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in *Madden* v. *Nelson and Fort Sheppard Ry.* (1): "It is a very familiar principle that you cannot do that "indirectly which you are prohibited from doing directly." The substance and not the form of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that under colour of an Act relating to the class of subject described in head 14 of s. 92, the Provincial Parliament has passed legislation which is beyond their powers.

In the result, their Lordships agree with the judgments of Ewing J. and of the majority of the Appellate Division of the Supreme Court of Alberta, and they will humbly advise His Majesty that this appeal should be dismissed, with costs.

The question in the second appeal is whether the Act, c. 13 of the Statutes of Alberta, 1937, is within the powers of the Alberta Legislature. The respondent began the proceedings by way of petition claiming that the Act is ultra vires the Alberta Legislature, and asking for a declaration of the Court accordingly. The respondent is a body corporate in accordance with the law of the Province, and owns a number of debentures to the amount of 373,000 dollars, lawfully issued by the Province under powers conferred on the Province by Statutes of Alberta and Orders of the Lieutenant-Governor in Council. The debentures, which were issued at different dates, bear rates of interest varying according to the conditions of the several debentures. The respondent, on presenting interest coupons from time to time, has been refused payment of interest by the defendant at the agreed rates. The defendant relied on, and now pleads, the provisions of the Act, c. 13 of 1937, entitled "An Act respecting the Interest payable on Debentures and "other securities of the Province." The Act applies to all debentures theretofore issued by the Province. Sect. 3, sub-s. 1, of the Act provides that: "Notwithstanding any "stipulation or agreement as to the rate of interest payable "in respect of any security, on, from and after the first day of

1940 A.C. p. 535.

(1) [1899] A.C. 626, 627.

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"June, 1936, the rate at which interest shall be payable in "respect of any security shall be as follows:". The new rates are then set out, and, in general, they are half the agreed rates. Sect. 3, sub-s. 2, declares the rights of holders of the debentures of the Province covered by the Act to be those set out in the Act. These two sub-sections are the whole Act, apart from a section protecting trustees or fiduciaries, and another section repealing the Act of the previous session, of which the short title was the Provincial Securities Interest Act.

Their Lordships have considered the Act with a view to ascertaining its "true nature and character," or "its pith "and substance." It relates in substance not to borrowing, but to payment of interest in respect of existing debentures and other securities at less than the contract rates. The appellant made submissions similar to those presented in the first appeal, and their Lordships, without repeating the reasons already given in deciding the first appeal, take the same view of this Act as of the two Acts, cc. 11 and 12 of 1937. Their Lordships were invited to hold that the Act, c. 13, could be justified by reference to head 3 of s. 92, "the borrowing of money on the sole credit of the Province." The argument, in their Lordships' view is not well-founded on the facts of this case, and fails by reason of their view that in pith and substance this Act relates to "interest."

The appellant submitted one other argument with which it is necessary to deal. It was said that the position of the Crown is not touched by s. 2 of the Interest Act of Canada by reason of the provisions of s. 16 of the Interpretation Act (R.S.C., 1927, c. 1), which enshrines the doctrine that the Crown is not bound by any Act unless it is expressly mentioned therein. The argument could only be relevant on the assumption that the Act, c. 13, would be valid but for the fact that it conflicts with the Dominion Interest Act. Their Lordships, however, take the view that the Provincial Act is ultra vires on the ground that its pith and substance relate to interest. If it was necessary to deal with the appellants' submission that the Crown is not bound by the Interest Act, their Lordships would be content to adopt the judgment on this point of Shepherd J.

1940 A.C. p. 536.

Their Lordships will humbly advise His Majesty that this appeal also should be dismissed.

The appellants will pay the respondents' costs.

Solicitors for appellants in both appeals: *Blake & Redden.*

Solicitors for respondents and for the Attorney-General for Canada in both appeals: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

REX.....APPELLANT;

AND

WILLIAMS AND ANOTHER.....RESPONDENTS.

1942 A.C. p. 541.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Revenue—Succession duty—Shares in company—Certificates, signed and endorsed in blank, physically out of province—Shares effectively transferable in either of two legally established transfer offices—Situs for purposes of duty—Succession Duty Act, 1934 (24 *Geo.* 5, *c.* 55), *s.* 6, *sub-s.* 1—*Ontario Companies Act, R. S. O.*, 1937, *c.* 251, *ss.* 56, 60, 101, 102.

A testator, who died domiciled in the State of New York, owned shares in a company incorporated under the Ontario Companies Act, 1937, which had its head office in Ontario and purported to have two agency offices, one in Toronto, Ontario, and the other in Buffalo, in the State of New York, where shareholders might have their stock registered and transferred in the books of the company. The share certificates, which at all material times were physically located in the State of New York, were under the seal of the company, and the endorsements on the back of the certificates of forms of transfer of the shares and the appointment of an attorney for that purpose were signed by the testator leaving the names of the transferees and of the attorneys in blank. On a claim by the Crown in right of the Province of Ontario to succession duty on the ground that the shares were at the date of the death situate in the province within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario:—

1942 A.C. p. 542.

Held, that there was nothing in the Ontario Companies Act, 1937, or in the by-laws of the company to preclude it, in the exercise of its common law powers, from legally establishing a transfer office in a place outside the province, and, accordingly, the shares at and before the death of the testator could be effectively dealt with, and were transferable, both in Toronto and in Buffalo. "Effectively dealt with" means as between the shareholder and the company.

Brassard v. *Smith* [1925] A.C. 371, and *Erie Beach Co.* v. *Attorney-General for Ontario* [1930] A.C. 161, examined and discussed.

The principle in *Brassard* v. *Smith (supra)*, that the situs of shares in a company is where they can be effectively dealt with, has not lost all weight even if a choice has to be made between more than one place where the shares can be effectively transferred, and one or other of two possible places must be selected on a rational ground. The existence in Buffalo at the date of the testator's death of certificates in his name, endorsed by him in blank, was decisive, for in a business sense the shares could effectively be dealt with in Buffalo and not in Ontario, since the certificates so signed and endorsed were not mere evidence of title, but were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario, whereas in Ontario nothing effective could lawfully be done there without producing the certificates,

* *Present:* VISCOUNT MAUGHAM, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD CLAUSON.

and the legal personal representatives could not be compelled to part with them to enable transfers to be effected in Ontario rather than at Buffalo. The shares were, accordingly, not subject to succession duty in Ontario.

Rex v. *National Trust Co.* [1933] S.C.R. (Can.) 670, referred to.

The share certificates were not of the nature of specialties, and the fact that they were under seal could not be treated as establishing that they must be regarded as situate where they were found at the death of the testator.

In re Drogheda Steam Packet Co., Ld. (1903) 1 Ir. R. 512; *Smith* v. *Cork & Bandon Ry. Co.* (1870) Ir. R. 5 Eq. 65; and *In re Artizans' Land & Mortgage Corporation* [1904] 1 Ch. 796, referred to.

Judgment of the Court of Appeal for Ontario [1940] O.R. 403, affirmed.

APPEAL (No. 19 of 1941) from a judgment of the Court of Appeal for Ontario (November 16, 1940) affirming a judgment of McTague J. A. (May 15, 1940).

The following facts are taken substantially from the judgment of the Judicial Committee. The question in this appeal was whether 10,200 fully paid shares of the capital stock of Lake Shore Mines, Ld., a company incorporated by letters patent, dated February 25, 1914, issued under the Ontario Companies Act, which belonged at the date of his death, on July 22, 1934, to the late Alexander Duncan Williams (the testator), an American citizen, who died domiciled in the city of Buffalo, in the State of New York, were at the date of the death situate in the Province of Ontario within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario (1), so as to render the respondents, the executors

1942 A.C. p. 543.

1942 A.C. p. 544.

(1) By Succession Duty Act, 1934, s. 6, sub-s. 1: "All property situate "in Ontario and any income there- "from passing on the death of any "person, whether the deceased was "at the time of his death domiciled "in Ontario or elsewhere, and every "transmission within Ontario owing "to the death of a person domiciled "therein of personal property locally "situate outside Ontario at the time "of such death, shall be subject to "duty at the rates hereinafter "imposed."

By Ontario Companies Act, 1937, s. 56, sub-s. 1: "The shares of the "company shall be deemed personal "estate and shall be transferable on "the books of the company in such "manner and subject to such condi- "tions and restrictions as by this Act, "the special Act, the letters patent, "supplementary letters patent or by- "laws of the company may be pre- "scribed." Sub-sect. 2: "Subject "to s. 58, no by-law shall be passed "which in any way restricts the right "of a holder of paid-up shares to "transfer the same, but nothing in "this section shall prevent the regu- "lation of the mode of transfer "thereof."

Sect. 60: "No transfer of shares, "unless made by sale under execu- "tion or under the order or judgment "or a competent court, shall, until "entry thereof has been duly made, be "valid for any purpose whatever, "save only as exhibiting the rights "of the parties thereto towards each "other, and, if absolute, as rendering "the transferee and the transferor "jointly and severally liable to the "company and its creditors until "entry thereof has been duly made "in the books of the company."

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of the testator, liable for succession duty in Ontario. The share certificates, which at all material times were physically located in the State of New York, were, pursuant to para. 17 of by-law No. 2 of 1914, under the seal of the company, and the endorsements on the back of the certificates of forms of transfer of the shares and the appointment of an attorney for the purpose were signed by the testator, leaving the names of the transferees and of the attorneys in blank. At the date of the death the company, whose head office was in Ontario, purported by resolutions to have established two offices where transfers of its shares might properly be made in the books of the company, one in Toronto, Ontario, and one in Buffalo, in the State of New York. The respondents, who had obtained letters probate of the testator's will in the State of New York, and subsequent ancillary letters probate in Ontario, where he possessed other property apart from the shares in question, began the proceedings out of which this appeal arose by petition of right claiming a refund of $65,336.17 succession duties paid under protest to the treasurer of Ontario in respect of the shares.

Lake Shore Mines, Ld., was authorized by its charter "to "hold meetings of its shareholders, directors and executive "committee outside of the Province of Ontario" (s. 53).

Sect. 101: "The corporation shall "cause the secretary, or some other "officer specially charged with that "duty, to keep a book or books where- "in shall be kept recorded—*(a)* a "copy of the letters patent and of any "supplementary letters patent issued "to the corporation and, if incorpor- "ated by special Act, a copy of such "Act, and the by-laws of the corpora- "tion duly authenticated; *(b)* the "names, alphabetically arranged, of "all persons who are and who have "been shareholders or members of "the corporation; *(c)* the post office "address and calling of every such "person while such shareholder or "member; *(d)* the names, post office "addresses and callings of all persons "who are or have been directors of "the corporation, with the date at "which each person became or "ceased to be such a director; and "in the case of a corporation having "share capital,—*(e)* the number of "shares held by each shareholder; "*(f)* the amounts paid in, and "remaining unpaid respectively, on "the shares of each shareholder; "*(g)* the date and other particulars "of all transfers of shares in their "order."

Sect. 102, sub-s. 1: "The books "mentioned in ss. 101 and 107 shall "be kept at the head office of the "corporation within Ontario, whether "the company is permitted to hold "its meetings out of Ontario or not." Sub-sect. 3: "Upon necessity therefor "being shown and adequate assur- "ance given that such books may be "inspected within Ontario by any "person entitled thereto after applica- "tion for such inspection to the "Provincial Secretary, the Lieu- "tenant-Governor in Council may "relieve any corporation permitted "to hold its meetings out of Ontario "from the provisions of this section "upon such terms as he may see fit."

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1942 A.C. p. 545.

No Order-in-Council had been passed under s. 102, sub-s. 3, of the Companies Act relieving the company from the necessity of keeping the books mentioned in ss. 101 and 107 of the Act at its head office in Ontario.

McTague J.A., sitting as a judge of first instance, granted the respondents a declaration that the shares were not property situate in Ontario passing on the death, and were not subject to succession duty, and that they were entitled to a refund of the duty paid, and his decision was affirmed unanimously on appeal by the appellant to the Court of Appeal for Ontario (Robertson C.J.O., Middleton, Masten, Fisher and Henderson JJ.A.). The appeal is reported at [1940] O.R. 403.

The Crown appealed.

1942. Feb. 24, 25, 26; Mar. 2, 3. *Pritt K.C.* and *Gahan* for the appellant. Shares in a company are situated where they can be effectively dealt with and transferred, and the real question is whether the establishment of the transfer agency in Buffalo was a valid and lawful act, making it possible to transfer the shares there without having in any way to resort to the Province of Ontario. The pretended establishment of the transfer agency in Buffalo was an ineffectual or unlawful act. However convenient it may be to carry out transfers there, they are not complete until they are entered in the books of the company, and these books are kept in Ontario. In *Attorney-General* v. *Higgins* (1) it was said "the evidence of title to these shares is the register "of shareholders, and that being in Scotland this property is "located in Scotland" (2). The true test of situs was said in *Brassard* v. *Smith* (3) to be "where the shares could be "effectively dealt with." Where there are two registers, the answer to the point as to "effectively dealt with" may well be to go to the place where the principal register is. *Erie Beach Co.* v. *Attorney-General for Ontario* (4), on which reliance is placed, gets a little nearer to this particular problem, but does not seem to have carried the matter much further than *Brassard* v. *Smith* (3). Of the English cases *In re Clark. McKecknie* v. *Clark* (5) is not directly in point. [Reference was also made to *Baelz* v. *Public Trustee* (6).] There are

(1) (1857) 2 H. & N. 339.
(2) Ibid. 351. (A.C.)
(3) [1925] A.C. 371.
(4) [1930] A.C. 161.
(5) [1904] 1 Ch. 294, 298.
(6) [1926] Ch. 863.

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several Canadian decisions on similar lines to *In re Macfarlane* (1), but they do not give much assistance: *Rex* v. *National Trust Co.* (2). In *In re Macfarlane* (1) there was a register of a Dominion company at the place where the shareholder died, and the shares were there, and it was held that that was the locality of the shares, but there is nothing specifically justifying the assertion that that rule was applied as a matter of principle. [LORD MACMILLAN. *English Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners* (3) is of interest for the general observations therein.] On the facts of the present case the situs of the shares is Ontario. The effect of *Toronto General Trusts Corporation* v. *The King* (4) is that the fact that transfer can be effected legally in two places cannot fix the situs, which is there fixed almost tacitly by the only other thing available, the domicile of the de cujus. There does not appear to be any provision in the Dominion Companies Act about shifting from register to register, but there is definite provision in the Bank Act, 1923, c. 32, s. 42, sub-ss. 4, 5, 6. The conduct of the business in *Attorney-General of Nova Scotia* v. *De Lamar* (5) was the same as in the present case, but there was legislation which got rid of the provision about keeping the register at the head office. *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (6) does not affect this case, and is not an authority of the Supreme Court of Canada against the appellant's contentions. *In re Thoburn. Ivey* v. *The King* (7) at first sight looks rather against those contentions, but when examined does not seem to have much bearing. [Reference was then made to the relevant sections of the Ontario Companies Act as set out above.] To get a valid transfer Mr. Williams or his executors or other transferees would of necessity have to come into the Province of Ontario to get the matter effectively dealt with. Sect. 56 gives a positive method of transfer, and provides no other, and, therefore, you can only transfer on the books of the company in such manner as is prescribed by the Act. Sect. 60 enacts that the transfer is invalid until the entry has been duly made in the books of the company; the

(1) (1933) O.R. 44.
(2) [1933] S.C.R. (Can.) 670, 673, 677.
(3) [1932] A.C. 238.
(4) [1938] 1 D.L.R. 40.
(5) (1922) 61 D.L.R. 251.
(6) [1931] S.C.R. (Can.) 170, 182, 189.
(7) [1939] 1 D.L.R. 631, 643.

transfer books referred to in s. 56 are, it is submitted, included in the books mentioned in s. 101, and have, therefore, under s. 102, to be kept at the head office of the company in Ontario. There is no provision in the Act for the establishment of a branch register. If it is sought to make out that the register in Buffalo is a register in the full sense, so that one can get complete title, then the books ought to be taken to Ontario, because the Act says that they must be kept there. There is no way out of that dilemma. In the end title will depend on what is in *the* register, which by s. 102 is kept, and must be kept, at the head office. [Counsel was not required to deal with the question whether the share certificates were specialties.] Finally, these shares have not in fact been endorsed. No doubt, Mr. Williams signed them, but an endorsement for the present purpose must be completed by delivery and there is no evidence that the testator ever handed them to anybody.

1942 A.C. p. 547.

Charles Romer K.C. and *Raymond Jennings* for the respondents. The views and conclusions adopted in the courts below on the questions at issue were right, and as the executors have paid duty on the shares in the State of New York they ought not to have to pay further duty under the Ontario Succession Duty Act. The appellant's contention that s. 60 of the Ontario Companies Act, which provides that no transfer of shares shall be valid for any purposes until entry in the books of the company and that "books of the company" there means the books referred to in s. 101, which, by reason of s. 102, have to be kept at the head office is not correct. While it is true that s. 60 deprives a transfer of validity until an entry is duly made in the books of the company, there is no reason—and there are elements against it—for linking up the books of the company there with certain books which for purposes of information have to have particular matters entered in them and are to be kept at the head office. The reason for ss. 101 and 102 is to be found partially in s. 74 and partially in s. 105. The mode or manner of transfer is left to the directors to be determined by by-law. Contrary to the view of the appellant that every transfer has been ineffective if not entered in the books at the head office, a transfer is binding on the company if it is effected at one of the transfer agencies, unless it is invalidated by reason of the provisions of s. 60.

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It does not matter where the transfer takes place, provided that the persons regarded by the legislature as having an interest in the matter have accurate and full information specified in detail under s. 101 made available to them at a particular place. To attribute to s. 60 the very rigid construction sought for by the appellant would not only result in the greatest possible inconvenience to a number of people, but would be whittling down the powers conferred on the directors by s. 91 and, in a modified form, by s. 56.

1942 A.C. p. 548.

The head office was transferred from Haileybury to Kirkland, which is 300 or 400 miles from the transfer agency at Toronto. The agencies carry out the transfers without reference to the head office. Sect. 206 of the Dominion Companies Act, 1934, draws a clear distinction between a book in which transfers are entered and carried through and another at the head office in which particulars of those transfers are to be recorded for the purpose of inspection: *In re Thoburn. Ivey* v. *The King* (1). These shares can be effectively dealt with in Buffalo. The headnote in *Erie Beach Co.* v. *Attorney-General for Ontario* (2) appears to have put a gloss on the decision of the Judicial Committee which is not warranted, and the case has given rise to a certain amount of misunderstanding in Canada, but in that case there was a prohibitive by-law which prevented transfers except at the head office. In *Treasurer of Ontario* v. *Blonde* (3) the shareholder died in Ontario, with the shares in his possession there, but they could only be transferred in Michigan or New York, and it was held that they were not liable to Ontario succession duty. [Reference was made to *Colonial Bank* v. *Cady and Williams* (4) and *Stern* v. *The Queen* (5).] In *In re Clark. McKecknie* v. *Clark* (6), where there were equal means of effectively transferring the shares—in South Africa and in England—and possession of the certificate was essential to complete the title to them, it was held on that ground that they were situated in England. Whatever test is applied with a view to establishing that these shares were property situate in Ontario, it breaks down. If regard be had to *Stern's* case (5), that the place is where the shares could be cashed, that also was in Buffalo, because the share

(1) [1939] 1 D.L.R. 631.
(2) [1930] A.C. 161.
(3) [1941] O.R. 227.
(4) (1890) 15 App. Cas. 267.
(5) [1896] 1 Q.B. 211.
(6) [1904] 1 Ch. 294.

certificates were there. Even assuming that the construction of the Ontario Companies Act contended for by the respondents is wrong, it does not necessarily follow that the shares were situate in Ontario; on that hypothesis a purchaser of the shares would not get a registered title, that would remain where it was, but he would get every right except the right to vote; he would have to go to Ontario to complete his title. Reliance is placed on *Attorney-General of Nova Scotia* v. *De Lamar* (1), which is very much in point in the present case. Since this matter was before the Court of Appeal for Ontario *Treasurer of Ontario* v. *Blonde* (2) has decided that share certificates are not specialties. [Reference was also made on that question to *In re Artizans' Land & Mortgage Corporation* (3), in which Byrne J. followed *In re Drogheda Steam Packet Co.* (4).]

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Raymond Jennings, following. If the words of the Act are clear the Board are not concerned with any question of justice or convenience, but these matters may be taken into account if there is ambiguity in the Act: *In re Robb's Contract* (5). To decide in favour of the appellant would result in double duty being payable, which is consonant neither with justice nor convenience.

Pritt K.C. replied.

Apr. 23. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM who, after stating the facts, continued: In this case there is no question of a transmission within Ontario, and it is admitted that the deceased was domiciled in the State of New York. The question, then, is the simple one: Were the shares in question property situated in Ontario? If they were, the appellant is entitled to the duty in right of the province. If they were not, the sum paid ($65,336) for duty in respect of the shares with interest was rightly ordered to be repaid to the respondents by the judgment under appeal and the judgment should be affirmed. It was contended on behalf of the appellant that the company had no power to provide that its shares could effectively be transferred in the city of Buffalo. If this contention is well founded the appeal should succeed. If it fails other questions will arise for decision.

(1) 61 D.L.R. 251.
(2) [1941] O.R. 227.
(3) [1904] 1 Ch. 796.
(4) (1903) 1 Ir. R. 512.
(5) [1941] Ch. 462, 478-9.

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Shares in a company are "things in action" which have in a sense no real situs, but it is now settled law that for the purposes of taxation under such a statute as the Succession Duty Act they must be treated as having a situs which may be merely of a fictional nature. The decision of this Board in *Brassard* v. *Smith* (1) has been treated as laying down a correct test for ascertaining for fiscal purposes the situs of such shares. That was a claim by the collector of succession duty in the Province of Quebec in respect of certain bank shares, and it may be noted that the Treasurer for the Province of Nova Scotia had already recovered judgment for succession duty in respect of the same shares. In effect, therefore, it was a contest between the authorities of the two provinces, each of which could only levy "direct taxa-"tion within the province in order to the raising of a revenue "for provincial purposes": British North America Act, 1867, s. 92, sub-s. 2. The shares were those of the Royal Bank of Canada, whose head office was at Montreal. The deceased died resident and domiciled in Nova Scotia, and intestate. The bank, however, had power by a Dominion statute to maintain in any province a registry office at which alone shares held by residents of that province could be registered and validly transferred. The Judicial Committee held that the ownership of the shares could only be effectively dealt with in Nova Scotia, and, therefore, were not property in Quebec for succession duty purposes, although the head office of the bank was at Montreal. In delivering the judgment of their Lordships, Lord Dunedin observed that the case was really settled by the decision in *Attorney-General* v. *Higgins* (2). After citing from the judgment of Martin B. in that case he continued (3): "It is quite true that in that case the head office as well as "the register was in Scotland, but in their Lordships' view "it is impossible to hold that in that case the position of "the head office was the dominant factor merely on the "strength of a phrase used by the reporter of the Attorney-"General's argument, and a casual reference made to the "case by Lord Esher in a subsequent case of *Attorney-"General* v. *Lord Sudeley* (4). In the present case Duff J., "dealing no doubt with the 'no local situation' argument, "said as follows: 'And the Chief Baron's judgment, I think,

1942 A.C. p. 550.

(1) [1925] A.C. 371.
(2) 2 H. & N. 339.
(3) [1925] A.C. 376.
(4) [1896] 1 Q.B. 354.

"'points to the essential element in determining situs in "'the case of intangible chattels for the purpose of probate "'jurisdiction as "the circumstance that the subjects in "'"question could be effectively dealt with within the "'"jurisdiction".' This is, in their Lordships' opinion, "the true test. Where could the shares be effectively "dealt with? The answer in the case of these shares is "in Nova Scotia only, and that answer solves the question." The claim on behalf of Quebec therefore failed.

Some five years later *Erie Beach Co.* v. *Attorney-General for Ontario* (1) came before the Board. At first sight it strongly resembled the present case, for it related to shares in a company incorporated under the Ontario Companies Act, having its head office in that province. The deceased was one F. V. E. Bardol, and he was domiciled in the State of New York. He was the person chiefly concerned in the undertaking which was carried on at Fort Erie on the Canadian side. All the meetings of the company were held at Buffalo; its business was conducted from its office there; and all its books and records, including its records of share transfers, were kept there, regardless, apparently, of Canadian law. It is a fair inference that Mr. Bardol kept the certificates for the shares issued to him in Buffalo, but nothing is said in the report as to this. The claim on behalf of the Attorney-General of Ontario was for succession duty under s. 7 of the Act. The company had no legal transfer office in the State of New York. It had in fact passed a by-law, No. 22, in these terms: "Shares of stock in the "company shall not be transferable without the consent and "approval of a quorum of the Board of Directors. The "shares of the company shall only be transferable by the "recording on the stock book of the company at the head "office of the company, or at the office of the company's "transfer agents, if any, by the shareholder or his or her "attorney, of the transfer thereof and the surrender of "the certificate of such share, if any certificate shall have "been issued in respect thereof, and upon the making of such "transfer in the books of the said company the transferee "shall be entitled to all the privileges and subject to all the "liabilities of the original shareholder, provided that the "directors, in case any certificate or share shall have been "lost, may in their discretion accept and cause to be

1942 A.C. p. 551.

(1) [1930] A.C. 161.

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"recorded the said transfer without the production of the "original certificate." But no transfer agents in Buffalo were ever appointed, and Lord Merrivale, in delivering the judgment of the Board, after referring to certain sections of the Ontario Companies Act, had no difficulty in deciding that the shares in question, following the decision in *Brassard* v. *Smith* (1), could only be effectively dealt with in Ontario, and were, therefore, property situate there for the purposes of the Ontario Succession Duty Act. The maxim mobilia sequuntur personam was held to have no application in such case. It may be added parenthetically that the headnote in the Law Reports is not quite accurate, but it is difficult to see any ground of substance for criticizing the judgment delivered by Lord Merrivale. He cited the by-law and relied on it. McTague J.A. seems to have thought that the Board had some responsibility for the headnote, but that is not so. Their Lordships, however, quite agree with the learned judge that the *Erie Beach* case (2) is not an authority for holding that the provisions of the Ontario Companies Act altogether preclude a company subject to its provisions from legally establishing a transfer office in some place outside the province or inside it at some place other than at the head office.

1942 A.C. p. 552.

This is a question their Lordships have now to consider. They observe at this point that the two decisions of the Board, which have repeatedly been followed in Canada, relate to cases where there was a single province in which alone shares could be effectively dealt with, though, of course, the principle may have a limited operation in certain other cases. The legal position of the company as regards transfer offices and the registration of share transfers must depend mainly on the Ontario Companies Act and the by-laws of the company, for it is not suggested that there is anything in the letters patent incorporating the company which limits its common law powers in those respects. It should, however, be mentioned that the letters patent provide (inter alia) that the head office of the company is to be situate at the town of Haileybury in the Province of Ontario. In fact, the head office for some time past has been at Kirkland Lake. The letters patent also authorized the holding of meetings outside of the Province of Ontario.

(1) [1925] A.C. 371. (2) [1930] A.C. 161.

[Having cited the relevant sections of the Ontario Companies Act, R.S.O., 1937, c. 251, his Lordship continued:] On December 21, 1916, the directors of the company passed a resolution appointing The Trusts and Guarantee Company, Ld., transfer agent and registrar of the capital stock of the company in the City of Toronto. On May 21, 1925, the directors of the company passed a resolution appointing the Royal Trust Company registrar of its stock in the City of Toronto. On May 18, 1927, the directors of Lake Shore Mines, Ld., passed the following resolution: "That the "company hereby designate and appoint Manufacturers & "Traders Trust Company of Buffalo, New York, as an "additional registrar and transfer agent at which office "shareholders may have their stock registered and trans- "ferred within the United States of America." Their Lordships agree with all the judges in Canada that this resolution was within the powers of the directors, if the company had such a power. In 1914 the company had passed a by-law, No. 2, para. 17 of which related to transfers of stock. It was in the following terms: "17. A stock "transfer book shall be provided in such form as the board "of directors may approve of and all transfers of stock in "the capital of the company shall be made in such book "and shall be signed by the transferor or by his attorney "duly appointed in writing. Stock certificates shall be in "such form as the board may approve of and shall be under "the seal of the company and shall be signed by the president "or vice-president and the secretary or such other officer in "place of the secretary as the board may by resolution "authorize." It is not in dispute that since the directors' resolution of May 18, 1927, American shareholders of the company have completed transfers of their shares through the Buffalo agency on books belonging to the company, and have had new certificates issued to and registered in the names of purchasers. Shares are transferable in either Buffalo or Toronto irrespective of where the certificates were issued. Careful steps are taken to prevent an over-issue of shares by daily reports being made by the officials of the company in Toronto and Buffalo as to the various transfers which are being effected day by day in the two cities respectively, and as to the issue of new certificates to new members.

1942 A.C. p. 553.

It is contended by the appellant that, in the circumstances stated and in view of the Ontario Companies Act provisions,

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the company could not establish an agency office in the State of New York where transfers of its shares might be made in its books pursuant to ss. 56 and 60 of the Act. The point is not free from difficulty, and it has been elaborately argued. The contention on behalf of the appellant is mainly based on the view that the transfer books of the company, on which according to s. 56, sub-s. 1, the shares are transferable, must be included in the books mentioned in s. 101, in one of which books "must be recorded" the date and other particulars of all transfers of shares in their order, for all such books must (under s. 102) be kept at the head office of the company within Ontario. The Lieutenant-Governor in Council might have relieved the company from that provision if he thought fit, under s. 102, sub-s. 3, but he has not done so. There are some sections in the Act which at first sight seem to assist the appellant's contention, but, on the whole, their Lordships are satisfied that it cannot prevail. It is important to observe that the company could set up a transfer office out of Ontario unless there is in the Companies Act under which it was created an express declaration to the contrary: s. 217 of Act. Is there such a declaration? It is reasonably plain that the purpose of s. 101 is widely different from that of ss. 56 and 60. The first, like s. 107, is aimed at providing information to shareholders and creditors who are given a right of inspection under s. 105 "at the head office or chief place of carry-"ing on its undertaking." The objects of ss. 56 and 60 are mainly devoted to the rights of shareholders, and relate in particular to the regulations as to transfers of shares. Provided books are kept complying in all respects with s. 101 it is difficult to see why other books should not be kept elsewhere, outside of Ontario if so desired, in which shares shall be transferable as provided in s. 56. There is, at any rate, no express provision to the contrary, and it is significant in this connection that s. 102 is in terms confined to books mentioned in ss. 101 and 107, and does not include those mentioned in s. 56, or s. 60.

1942 A.C. p. 554.

The conclusion on this point must, therefore, be in agreement with all the judges in Canada who have dealt with the matter, namely, that the company had legally established a transfer agency in Buffalo and that the shares in question at and before the death of the testator were transferable both in Ontario and in Buffalo. The answer, then, to the

question where the shares could be effectively dealt with, must be, either in Ontario or in the State of New York, and further reasons must be found to justify a preference being given to one or the other. Fisher J.A. stated such reasons in his opinion (1): "As Williams had the physical control of "the certificates of these shares up to the time of his decease "and as they were registered in his name and thereby evi- "dencing ownership in him of property in the United States "of America, and of property which he could have sold and "effectively transferred at any time to a purchaser in the "United States of America, and also could have assigned or "pledged as security in a commercial transaction to an "American citizen, the situs of the shares was in the United "States of America."

It will be convenient at this place to deal with the contention that the certificates are specialties on the ground that they are under the seal of the company, and that the shares were therefore situate in Buffalo. This was held to be the case by the judgment of Masten J.A. on the authority of two Irish cases (*In re Drogheda Steam Packet Co., Ld.* (2); *Smith* v. *Cork & Bandon Ry. Co.* (3)), and of *In re Artizans' Land & Mortgage Corporation* (4). These cases have not escaped criticism, as Masten J.A. himself observed, but whatever view may be taken as to their authority they do not justify the conclusion that a certificate for shares in a company is for general purposes a specialty. The word "specialty" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt, or a debt due from the Crown or under statute: see *Royal Trust Co.* v. *Attorney-General for Alberta* (5). Such an obligation was for centuries treated as very different from an ordinary debt. Indeed, the act of creating a specialty by deed was at one time possible only to men of the highest rank. Unlike debt, it was enforced by an action of covenant: Holdsworth, A History of English Law, 3rd ed., vol. iii., p. 417. The deed itself was the foundation of the action, the original debt, if any, being merged. The terms of the deed were conclusive. Specialty debts till recent times

1942 A.C. p. 555.

(1) [1940] O.R. 419.
(2) (1903) 1 Ir. R. 512.
(3) (1870) Ir. R. 5 Eq. 65.
(4) [1904] 1 Ch. 796.
(5) [1930] A.C. 144.

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conferred special rights. They used to rank in the administration of the estate of a deceased person in priority to simple contract debts; and, unlike such debts, were enforceable against the real estate. They were said to be "of a higher nature" than debts by contract. It is, therefore, not surprising that specialty debts by deed were treated from an early date as bona notabilia where the deeds were found at the time of the death, unlike ordinary debts which were said "to follow the person of debtor." That this is still the rule was decided in the House of Lords in the well-known case of *Commissioner of Stamps* v. *Hope* (1), where an interesting passage from Wentworth on the Office of Executors ((1763), pp. 45, 47, 60 (1.)) was referred to and followed: see also *Toronto General Trusts Corporation* v. *The King* (2). It may be useful to note that the situs of the specialty debt was originally one of considerable importance, because of the different prerogatives of the Archbishops of Canterbury and York. If there were assets in both provinces, there had to be several administrations, and administration in one was void as to the goods situate in the other: see Swinburne on Wills, 7th ed., vol. ii., p. 790 et seq. The rule as to situs had no meaning except in the cases where the specialty was an asset.

1942 A.C. p. 556.

Their Lordships are concerned here merely with the question whether the certificates being under seal can be treated as establishing that the shares of the testator must be regarded as situate where the certificates were found at the death of the testator. They plainly are not specialty *debts*. They do not contain any express obligation or promise. As Lord Cairns observed in *Shropshire Union Railways & Canal Co.* v. *The Queen* (3), the certificate was not the title, but evidence of the title, to the shares: see also *Attorney-General* v. *Higgins* per Martin, B. (4). Being little more than pieces of paper evidencing the right to shares in the company it is impossible to regard them as taking the modern place of "notable goods." The ancient rules as to situs of specialty debts have no real application in such a case. It should be added that the view that ordinary certificates for shares are not specialty debts has been assumed to be correct in a number of decided cases both in Canada and in England and in a much greater number of cases where there has been no

(1) [1891] A.C. 476.
(2) [1919] A.C. 679.
(3) (1875) L.R. 7 H.L. 496, 509.
(4) 2 H. & N. 339.

litigation. The rule laid down in *Brassard* v. *Smith* (1) would in practice be useless if the place where the certificates for shares were found at the time of the death should be taken to be necessarily the situs of the shares. Their Lordships have no hesitation in holding that the situs of the certificates is not, taken alone, sufficient to afford a solution to the present problem.

Before going further it is necessary to call attention to a circumstance which seems not to have been previously mentioned. Their Lordships noted that the only stock certificates proved in evidence of which complete copies were produced were two in number (exhibits 10 and 14), the first relating to 1000 shares in the name of A. D. Williams, and the second to 100 shares in his name. Each bears the usual endorsement on the back of forms of transfer of the shares and the appointment of an attorney for the purpose. The endorsements are signed, one of them "Alexander Duncan "Williams," and the other "A. D. Williams." The names of the transferees and of the attorneys are left in blank. These exhibits were put in at the trial by Stephen Albert Smyth, the manager of the Stock Transfer Department of the Trusts and Guarantee Company in Toronto. The exhibit 17A, which consisted of the original stock certificates of the company in the name of A. D. Williams, or Alexander Duncan Williams, for the whole 10,200 shares, was filed by consent of the parties on November 4, 1940, as though put in at the trial, and they were admitted by the appellant to be identical with one or other of the exhibits 10 and 14. Counsel for the appellant before their Lordships admitted that it must be taken in the circumstances that the testator had signed the endorsements on all the certificates in his name leaving the names of the transferees and of the attorneys in blank in the way usual both in the Dominion and in the United States. This had the admitted result of making a delivery of the certificates with the endorsements signed in blank a good assignment of the shares, since it passed a title to the assignees both legal and equitable, with a right as against the company to obtain registration and to obtain new certificates: *Colonial Bank* v. *Cady and Williams* (2). It must be accepted, therefore, as a fact, that the certificates were currently marketable in the State of New York as securities for the shares, and

1942 A.C. p. 557.

(1) [1925] A.C. 371. (2) 15 App. Cas. 267.

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that they were documents necessary for vouching the title of the testator to the shares. This conclusion of mixed law and fact has been followed in Canada in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (1). That was a case of conflicting claims to jurisdiction between the Canadian Custodian of Alien Enemy Property and the Alien Property Custodian of the United States. The decision of the Supreme Court depended on special circumstances, but incidentally it was held, and it was not here in dispute, that the lawful holder in the United States of certificates for shares endorsed and signed in blank by the holder is entitled both under Canadian and United States law to have himself or his nominee registered as the owner thereof.

There remains the question whether, accepting the view, first, that there were two places in which the shares could properly be registered (of which one was outside Ontario) and, secondly, that the certificates are not of the nature of specialties, the shares must be regarded as "property situate "in Ontario" at the date of the death. It may be useful here to make some general remarks on the meaning and effect of the principle laid down in *Brassard* v. *Smith* (2) and in the *Erie Beach* case (3). The first observation is that the phrase used in laying down the principle clearly means "where the "shares can be effectively dealt with as between the share-"holder and the company, so that the transferee will become "legally entitled to all the rights of a member," e.g., the right of attending meetings and voting and of receiving dividends. If the phrase only meant "effectively dealt with "as between transferor and transferee of shares," the test would obviously be almost completely useless, since the rights of a shareholder as between himself and a transferee can, speaking generally, effectively be transferred in any part of the world. The second observation is that the test, where applicable, is concerned merely with the place where the shares are to be taken to be situate. The late owner in the normal case was absolutely entitled to the shares as the registered owner of them in the books of the company, and, if resident in a country or province different from that in which the shares can be effectively dealt with, could

1942 A.C. p. 558.

(1) [1931] S.C.R. (Can.) 170. (2) [1925] A.C. 371.
(3) [1930] A.C. 161.

nevertheless have sold the shares and completed the transaction by an attorney or otherwise. That, however, does not touch the question of situs. Moreover, in relation to succession duties imposed by the provinces of Canada, some other propositions are well-founded. *Rex* v. *National Trust Co.* (1), a decision of the Supreme Court, related to a claim by the Crown in the right of the Province of Quebec to succession duties alleged to be due on the death of Sir Clifford Sifton in respect of bonds or debentures of two Dominion companies, the Grand Trunk Pacific Railway Company and the Canadian National Railway Company, guaranteed by the Government of Canada. Sir Clifford was domiciled in Ontario and died in Toronto, where the bonds or debentures were in his possession. The two companies had their head offices in Montreal, and the bonds or debentures were registered there where alone the bonds were transferable, and they were in neither case transferable by delivery. Succession duty had been paid to the government of the Province of Ontario. In Quebec, the duties were claimed under ss. 3 and 5 of the Quebec Succession Duties Act, and it had to be established that the bonds or debentures were "situate within the province" at the time of death. In what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff formulated as the result of the authorities certain propositions pertinent to the question of situs of property with which their Lordships agree. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. Secondly, situs in respect of intangible property must be determined by reference to some principle or coherent system of principles, and the courts appear to have acted on the assumption that the legislature in defining in part at all events by reference to the local situation of such property the authority of the province in relation to taxation, must be supposed to have had in view the principles deducible from the common law. Thirdly, a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining

1942 A.C. p. 559.

(1) [1933] S.C.R. (Can.) 670.

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the subjects in respect of which its powers of taxation under s. 92, sub-s. 2, of the British North America Act may be put into effect.

Their Lordships are now in a position to deal with the problem arising from the existence of two valid registries, one in Ontario and one in Buffalo. They observe that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec. It has been argued that in a case where shares can be effectively dealt with in registries existing in different fiscal areas, a possible view is that the case of *Brassard* v. *Smith* (1) and following decisions, above referred to, have no application, and that a completely different test or tests of situs should be applied, e.g., that of head office or principal place of business, or domicile, leaving out of account the principle laid down in *Brassard* v. *Smith* (1). Their Lordships do not accept this view. The principle seems to them not to have lost all weight even if in certain cases a choice has to be made as between more than one place where the shares can effectively be transferred. Moreover, to search through all the surrounding circumstances for a completely new ground for attributing a situs to the shares would certainly not be keeping within the "coherent system of principles" by which the courts ought to be guided in such a case. One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

1942 A.C. p. 560.

Their Lordships have come to the conclusion that the existence in Buffalo at the date of the death of certificates in the name of the testator endorsed by him in blank must be decisive in the present case. They must reject the notion that the domicile of the deceased has anything to do with the situs of the property, or that the maxim "mobilia sequuntur "personam" has any relevance. Some observations on this head contained in the judgment of the Board, delivered by Lord Thankerton, in *Provincial Treasurer of Alberta* v. *Kerr* (2) may be usefully referred to. As was long ago remarked, the owner in any country may dispose of his personal property in any other country, yet on his death the

(1) [1925] A.C. 371. (2) [1933] A.C. 710, 721.

maxim is applicable. The certificates endorsed and signed as they were cannot be regarded as mere evidence of title. They were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario. On the testator's death his legal personal representatives in the State of New York became the lawful holders of the certificates, entitled to deal with them there. Any sale by them would be "in order," and the purchaser could obtain registration in the Buffalo registry. If we contrast the position in Ontario the difference is obvious. Nothing effective could lawfully be done there without producing the certificates, and the legal personal representatives in Buffalo could not be compelled to part with them to enable the transfers to be effected in Ontario rather than at Buffalo. In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.

Their Lordships do not think it would be right for them to express any opinion as to the conclusion which they would have come to if the certificates had not been endorsed and signed in blank by the testator, for that point does not arise for decision, and there are some obvious distinctions arising in cases where the endorsement on certificates has not been signed by the registered holder. Further, they have avoided any citations from the recent decision of the Court of Appeal for Ontario in the case of *The Treasurer of Ontario* v. *Blonde* (1), for the reason that they were informed that an appeal to His Majesty in Council in that case is pending, and it seemed better not in any way to prejudice the appeal.

1942 A.C. p. 561.

On the above grounds their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lee & Pembertons.*

(1) [1941] O.R. 227.

J.C.* 1943 Feb. 1.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ALBERTA . . . APPELLANT;

AND

1943 A.C. p. 356.

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Debt Adjustment Act—Constitutional validity—Insolvency legislation—Ultra vires provincial legislature—Debt Adjustment Act, Statutes of Alberta, 1937, *c.* 9, *as amended to c.* 42 *of* 1941—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (21.).

1943 A.C. p. 357.

The Debt Adjustment Act, 1937, of Alberta, as amended to c. 42 of the 1941 Statutes of Alberta, the main purpose of which is to relieve persons resident in the province of Alberta and their estates from an enforceable liability to pay debts incurred before July 1, 1936, and in many cases to compel the creditors to accept compositions approved by the Debt Adjustment Board constituted under the Act, is ultra vires the provincial legislature. The Act, which effects its purposes by precluding persons from any access to the courts of Alberta to enforce their rights without the permission of the board, is in pith and substance legislation in relation to insolvency, and as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada under s. 91 (21.) of the British North America Act, 1867, in relation to bankruptcy and insolvency, and also obstructs and interferes with the actual legislation of the Dominion Parliament on those matters. The Act being ultra vires, s. 39 thereof, which, in effect, provides that the Act shall not be so construed as to authorize the doing of anything not within the legislative powers of the province, is inoperative.

Attorney-General for Alberta and Winstanley v. *Atlas Lumber Co., Ld.* [1941] S. C. R. (Can.) 87, and *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1937] A. C. 391, referred to.

Judgment of Supreme Court of Canada [1942] S. C. R. (Can.) 31, affirmed.

APPEAL (No. 20 of 1942), by special leave, by the Attorney-General for Alberta against the decision of the Supreme Court of Canada (December 2, 1941), which answered certain questions concerning the constitutional validity of the Debt Adjustment Act, 1937, of the province of Alberta, as amended by five later Acts. Those questions had been referred to the Supreme Court for hearing and consideration pursuant to s. 55 of the Supreme Court Act (R. S. C., 1927, c. 35) by the Governor-General in Council by an order made on May 19, 1941.

The following material provisions of the Act of 1937, the questions referred to the Supreme Court and their answers,

* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROMER, and LORD CLAUSON.

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are taken from the judgment of the Judicial Committee. The Act was in four parts, but Part II. had been repealed. There was a preliminary part containing definitions, including one stating that a " 'resident debtor' means a person who is a "debtor and who is an actual resident of and personally living "in the province, and includes the personal representative or "representatives, son, daughter, widow or widower, of a "deceased resident debtor, and includes a family corporation "which is a debtor" as therein mentioned. There was also a definition of "resident farmer." In s. 3 there was provision for the constitution of a Debt Adjustment Board, to consist of one, two or three members appointed by the Lieutenant Governor in Council. The powers of the board could be exercised by any single member or by any person designated by the board with the approval of the Lieutenant Governor. Under s. 6 the board had power to make "in- "quiries . . . . with regard to the property of any "resident debtor or resident farmer," and might examine the debtor or any other persons under oath and had the same power as a commissioner under "The Public Inquiries Act."

1943 A.C. p. 358.

Part I. of the Act began with s. 8 which in its first subsection enacted as follows:—

"8. (1.). Unless the board or any person designated by the "board under the provisions of this Act, issues a permit in "writing giving consent thereto:—*(a)* no action or suit for "the recovery of any money which is recoverable as a liqui- "dated demand or debt in respect of any claim enforceable by "virtue of any rule of law or equity or by virtue of any statute, "except money payable in respect of rates and taxes payable "pursuant to any statute, and debts owing to a hospital for "hospital services; and *(b)* no proceedings by way of "execution, attachment or garnishment; and *(c)* no action "or proceeding for the sale under or foreclosure of a mortgage "on land, or for cancellation, rescission or specific perfor- "mance of an agreement for sale of land or for recovery of "possession of land, whether in court or otherwise; and *(d)* "no action or proceeding to sell land under or in satisfaction "of any judgment or mechanic's lien; and *(e)* no seizure or "distress under an execution or under any lease or any "tenancy howsoever created, lien, chattel mortgage, condi- "tional sale agreement, crop payment agreement or in "attornment as tenant under any agreement for sale or

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"mortgage, and no sale or other proceeding thereunder either "by virtue of rights of property at common law or under a "statute passed prior to this Act; *(f)* no proceedings by a "lessor, mortgagee, vendor, or other person claiming posses- "sion of a share of crop in any case where the provisions of "The Crop Payments Act apply; and *(g)* no action respect- "ing such other class of legal or other proceedings as may "be brought within the provisions of this section by order of "the Lieutenant Governor in Council,—shall be taken, made "or continued by any person whomsoever against a resident "debtor in any case." Sub-sect. 3 provided that the section should not apply to any contract made or entered into by a debtor where the whole of the original consideration for the contract arose on or after July 1, 1936, but should apply to (among other things) any judgment obtained before July 1, 1936. By sub-s. 5: "the board may at any time in "its discretion cancel or suspend any permit which has "been previously issued under the section by the board." Under s. 9 no permit was to be granted in respect of any proceedings on a mortgage of farmlands or an agreement for sale thereof, if those proceedings led to foreclosure by reason only of the temporary impossibility owing to abnormal depreciation in values of realizing the probable normal value of the security. Under s. 10 a creditor might apply for a permit to commence or continue any action against a resident debtor, and the board in that case must make its proper inquiries, and thereupon might issue a permit, or refuse, or adjourn the application for such period as it thought fit. By s. 11 it was provided that the time during which proceedings were prohibited by the board did not run against the creditor under the Limitation of Actions Act, 1935.

1943 A.C. p. 359.

Part III. of the Act related to negotiations for agreements for the adjustment of debts of resident debtors. Sect. 21 provided that any resident debtor, or the creditor of any resident debtor, could by written application call on the board to investigate the resident debtor's financial position, and to endeavour to negotiate an agreement for the settlement of the debtor's debts, either in full or by a composition. The board was to have all the extensive powers of inquiry conferred by the Act. Any agreement between a resident debtor and a creditor made through the agency of the board, however informal, was to be binding (s. 22); and the board

(s. 23) was to endeavour to bring about an agreement between the resident debtor and his creditors whereby the secured and unsecured debts of the debtor were reduced to an amount which, in the opinion of the board, was in accordance with the ability of the debtor to pay, either presently or in the future, having regard to the productive capacity of the farm and its equipment and the average net prices of agricultural produce between the date of the debt being incurred and the date of adjustment (see ss. 22 and 23).

Part IV. contained provisions specially applicable to resident farmers. Sect. 26 provided that a resident farmer who was in default on a proposal formulated and confirmed under the Farmers' Creditors Arrangement Act, 1934 (a Federal Act: 1934, S.C., 24-25, Geo. 5, c. 53) could not be proceeded against by his creditor by any of the proceedings set out in s. 8 of the Debt Adjustment Act, 1937, unless the board issued a written consent under that section. Sect. 27 provided that a chattel mortgage given by a resident farmer after May 1, 1934, to secure a past debt should be invalid unless approved by the board within sixty days. By s. 28 a resident farmer could be authorized by the board, in order to supply his own necessities or fodder or seed grain, to sell free of encumbrance any goods or chattels subject to a chattel mortgage given by him. By s. 29 a resident farmer who was a lessee of land under a crop share lease might be authorized by the board to retain for his own use crop deliverable to the lessor.

1943 A.C. p. 360.

Part V. contained miscellaneous provisions, of which s. 36 was the most noticeable. It provided for an appeal by any person who deemed himself aggrieved by the action of the board in granting or refusing a permit or its other orders "to "a judge of the Supreme Court sitting with a jury of six "persons." Sub-sect. 8 provided that the question as to the action of the board in withholding or granting a permit, or in giving any direction under the Act was to "be a question of "fact for the determination of the jury under proper instruc- "tions from the judge and there shall be no appeal from such "determination or from any judgment or order made there- "on." The question of fact was nowhere defined. Sect. 32 provided for the imposition of a penalty, namely, a fine not exceeding two hundred and fifty dollars and, in default of payment, a term of imprisonment with hard labour not exceeding three months, or both, on any person who "wilfully

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"takes or continues any action or proceeding or makes or "continues any seizure or sells or disposes of a chattel in "violation of the provisions of this Act or the regulations."

The questions referred, and the answers given by the majority of the Supreme Court of Canada (Duff C.J.C., Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.), were as follows: Question 1: Is the Debt Adjustment Act, 1937, being c. 9 of the Statutes of Alberta, 1937, as amended by c. 2 of the Statutes of Alberta, 1937 (3rd session), c. 27 of the Statutes of Alberta, 1938, c. 5 of the Statutes of Alberta, 1938 (2nd session), c. 81 of the Statutes of Alberta, 1939, and c. 42 of the Statutes of Alberta, 1941, ultra vires of the legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent? Answer: The said Act as amended is ultra vires of the legislature of Alberta in whole.

1943 A.C. p. 361.

Question 2: Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 3: Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 4: Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such action or suit is for the recovery of: *(a)* the principal amount of such money and interest, if any, where the same are payable in the said province; *(b)* the principal amount of such money and interest, if any, where the same are payable outside the said province; *(c)* the interest only upon such money? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

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Question 5: If the answer to any of the parts *(a)*, *(b)* and *(c)* of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Crocket J., who dissented, was of opinion that the Act was not ultra vires or inoperative except in so far as its provisions conflicted with existing valid legislation of the Parliament of Canada.

1942. Nov. 23, 24, 25, 26, 30; Dec. 1, 2, 3. *Barton K.C.* and *Leonard Stone* for the appellant. The Debt Adjustment Act, 1937 (as amended), is in relation to matters coming within the classes of subjects enumerated in the following heads of s. 92 of the British North America Act, 1867, namely, (13.) property and civil rights in the province, (14.) the administration of justice in the province . . . . including procedure in civil matters in those courts, and (16.) matters of a purely local or private nature in the province, and it is, therefore, intra vires the provincial legislature. As to (16.), the Act of 1937 was directed to the relief of great local distress: *Union Colliery Co. of British Columbia* v. *Bryden* (1). As to (13.), the right of access to the courts is a "civil right in the province." The expression "civil "rights" is a wide one: *Citizens Insurance Co. of Canada* v. *Parsons* (2). As to (14.), so far, at any rate, as the Act affects execution and ordinary processes it is procedural. It is in the nature of a statute of limitation, and such a statute has always been held to be procedure: *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund* (3). [See also *Reg.* v. *Bush* (4); *Reference re Authority to Perform Functions Vested by the Adoption Act, etc.* (5); *Maley* v. *Cadwell* (6); *Beiswanger* v. *Swift Current City* (7); *Attorney-General for Ontario* v. *Attorney-General for Canada* (8); and *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (9).] The provincial legislature has power to destroy an individual cause of action, or to bar the courts to that cause of action. This,

1943 A.C. p. 362.

(1) [1899] A. C. 580, 584.
(2) (1881) 7 App. Cas. 96, 110.
(3) (1852) 8 Moo. P. C. 4, 35.
(4) (1888) 15 O. R. 398, 403.
(5) [1938] S. C. R. (Can.) 398, 406.
(6) [1934] 1 W. W. R. 51, 56.
(7) [1930] 3 W. W. R. 519, 520-521.
(8) [1894] A. C. 189, 198.
(9) [1940] A. C. 513, 538.

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therefore, is legislation regarding civil rights and procedure, and it must also be regarded as an emergency measure forced on the province by necessity. It is agreed that every provincial power is limited by s. 91 of the British North America Act, but the Act of 1937 is intra vires unless it can be shown that it infringes some head of s. 91. [*Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (2); *In re the Regulation and Control of Radio Communication in Canada* (3); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (4); *Attorney-General for Ontario* v. *Attorney-General for Canada* (5); and *Grand Trunk Ry. of Canada* v. *Attorney-General for Canada* (6), were referred to on the construction of ss. 91 and 92 of the North America Act.] The respondents say that the Act of 1937 invades the field of bankruptcy and insolvency, a subject-matter within the exclusive legislative power of the Dominion under s. 91 (21.), but voluntary compositions do not necessarily fall within the definition of bankruptcy and insolvency. They are part of the open territory which may be entered by either Dominion or province. [*Attorney-General for British Columbia* v. *Attorney-General for Canada* (7) was cited.] Nothing in the Act of 1937 deals with bankruptcy, purports to do so, or prevents the Dominion Bankruptcy Act from operating. There is no inconsistency: *Ladore* v. *Bennett* (8). Also, the Act of 1937 in no way conflicts with the Farmers' Creditors Arrangement Act, 1934 (a Dominion Act), for that legislation only occupies one part of the field, that covered by compulsory compositions, and does not deal with voluntary compositions. With regard to the Dominion Bills of Exchange Act, R. S. C. 1927, c. 16; the material provisions of that Act merely fix the legal incidents of a bill, and do not affect the method by which it shall be enforced. There is no word which touches on the procedure or affects procedural matters. [Reference was made to the *Winstanley* case (9)]. Again, the Act of 1937 in no way conflicts with the Dominion Interest Act, R. S. C. 1927, c. 102, which merely allows freedom of contract with

1943 A.C. p. 363.

(1) [1899] A. C. 367, 372.
(2) [1902] A. C. 73, 78.
(3) [1932] A. C. 304, 308, 323-326.
(4) [1892] A. C. 437.
(5) [1894] A. C. 189, 198.
(6) [1907] A. C. 65, 68.
(7) [1937] A. C. 391.
(8) [1939] A.C. 468, 480-482.
(9) [1941] S. C. R. (Can.) 87, 91.

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regard to interest. The Act of 1937 only affects interest incidentally. There are a number of Dominion Acts giving powers to loan and trust companies, e. g., An Act Respecting Loan Companies, R. S. C. 1927, c. 28, and it is alleged by the respondents that the Act of 1937 in some way conflicts with those Acts and is thus rendered incompetent. All those Acts, however, merely clothe the companies with capacity, and, therefore, their powers must be read as powers to do the things permitted subject to the regulations in force as to those particular matters in the province at the time. It is further said by the respondents that the Act of 1937 is invalid because it has an extra-territorial effect, but it only deals with proceedings within the province of Alberta, and it is no objection to such an Act that it may incidentally have an extra-territorial effect: *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (1); *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (2). With regard to severability, if necessary, the proper course would be to declare the Act of 1937 invalid in so far as it may be held to conflict with a Dominion Act: *Winstanley's* case (3) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (4).

1943 A.C. p. 364.

J. W. Estey K.C. (A.-G. for Saskatchewan) and *F. W. Wallace,* for the Attorney-General of Saskatchewan, in support of the appeal. This legislation was dictated by the abnormal economic conditions, and was intra vires the provincial legislature as falling within the British North America Act under s. 92 (16.): "Generally all matters of a merely local or "private nature in the province": [*Eddy* v. *Stewart* (5); *Korpan* v. *Supynuk* (6); and *St. James* v. *Bourke* (7).] A mere incidental encroachment on some field which is solely intra vires the Dominion will not invalidate the Act of 1937. The only head of s. 91 under which the Dominion government could step in would be "bankruptcy and insolvency." That, however, is a type of legislation which applies at all times, normal and otherwise, and s. 91 (21.) was never intended to apply when a community was passing through a period of famine: *Ladore* v. *Bennett* (8); *Day* v. *City of Victoria* (9); and *Attorney-General for Manitoba*

(1) [1902] A. C. 73, 79.
(2) [1920] A.C. 184, 189.
(3) [1941] S. C. R. (Can.) 87.
(4) [1937] A. C. 377, 388.
(5) [1932] 2 W. W. R. 699, 703.
(6) [1939] 1 W. W. R. 45, 47.
(7) [1938] 3 D. L. R. 287, 288.
(8) [1939] A .C. 468, 480-482.
(9) [1938] 3 W. W. R. 161.

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v. *Manitoba Licence Holders' Association* (1). The pooling and distribution of the assets of a debtor are the essentials of bankruptcy. This is not bankruptcy legislation because the board may deal with one debt only. Further, the board cannot exercise compulsion: *L'Union St. Jacques de Montréal* v. *Belisle* (2); *Attorney-General for Ontario* v. *Attorney-General for Canada* (3); *Ladore* v. *Bennett* (4). The Dominion government could not have passed the Act of 1937. If this legislation is procedural in character, it comes within the provincial jurisdiction under s. 92 (14.): *Eddy* v. *Stewart* (5); *Maley* v. *Cadwell* (6); *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (7); and *Royal Bank of Canada* v. *Workmen's Compensation Board of Nova Scotia* (8). The *Winstanley* decision (9) is based on the construction of s. 74 of the Bills of Exchange Act, and the Supreme Court read the words, rights and powers to sue, as the right to sue in a procedural sense. It is suggested that the history of that sense is indicated in *Goodwin* v. *Robarts* (10), and is merely substantive and not procedural. [Reference was also made to *Catellier* v. *Belanger* (11).] Further, it is a matter of procedure by analogy with the Statute of Limitations, the Statute of Frauds and the Evidence Act. Where the Dominion does not specifically provide a procedure it is the provincial procedure which obtains. [*In re Sharp* (12), *Great West Saddlery Co.* v. *The King* (13), *Lymburn* v. *Mayland* (14), *Citizen's Insurance Co. of Canada* v. *Parsons* (15), *Mahant Singh* v. *U Ba Yi* (16), and *Mutual Life Assurance Co.* v. *Levitt and Marks* (17) were cited.]

1943 A.C. p. 365.

Charles Romer K.C. and *Leonard Stone* for the Attorneys-General for Ontario and Manitoba, intervenants, and *F. W. Wallace*, for the Attorney-General for New Brunswick, intervenant, adopted the foregoing arguments.

Pritt K.C. and *Gahan* for the Attorney-General for Canada. The Act of 1937 does not come under heads (13.), (14.) or

(1) [1902] A. C. 73, 79.
(2) (1874) L. R. 6 P. C. 31, 38.
(3) [1894] A. C. 189.
(4) [1939] A. C. 468, 480-482.
(5) [1932] 3 W. W. R. 71, 73.
(6) [1934] 1 W. W. R. 51.
(7) [1920] A. C. 184.
(8) [1936] S. C. R. (Can.) 560.
(9) [1941] S. C. R. (Can.) 87.
(10) (1875) L. R. 10 Ex. 337, 349.
(11) [1924] S. C. R. (Can.) 436.
(12) (1896) 5 B. C. Rep. 117.
(13) [1921] 2 A. C. 91.
(14) [1932] A. C. 318.
(15) (1881) 7 App. Cas. 96.
(16) [1939] A. C. 601.
(17) [1939] 1 W. W. R. 530.

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(16.) of s. 92, but in pith and substance it deals either with bankruptcy and insolvency (s. 91 (21.)), or with the regulation of trade and commerce (s. 91 (2.)). Unless the Act can be brought squarely within some head of s. 92 the province cannot pass it: *Citizens Insurance Co. of Canada* v. *Parsons* (1). Its subject-matter is not "civil rights" (s. 92 (13.)), as limited in the light of the following authorities, because it is bankruptcy and insolvency or the regulation of trade and commerce: *John Deere Plow Co., Ld.* v. *Wharton* (2); *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (3); and *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (4). There are a large number of Dominion civil rights which derive from the powers of legislation covered by s. 91, and since the Act of 1937 embraces quite impartially civil rights within and without the province it is not dealing with civil rights within the province. The provincial legislature cannot so legislate as to withdraw from the control of the provincial courts any Dominion civil right: *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario* (5), *Ottawa Valley Power Co.* v. *Hydro-Electric Power Commission* (6). Emergency enlarges the rights of the Dominion, and, therefore, reduces those of the province: *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (7). The Act of 1937 cannot come within s. 92 (14.), for looked at in form, let alone substance, it has nothing to do with procedure in the Supreme Court of Alberta, and it is not any part of the administration of justice outside procedure. With regard to s. 92 (16.), this matter can hardly be of a merely local nature when it affects to exactly the same extent creditors who have no connexion with the province and those who are Albertian people in every sense, and affects equally rights arising outside the province under Dominion legislation and those arising inside the province under provincial legislation. This statute comes within "bankruptcy and insolvency" (s. 91 (21.)). Insolvency is wider than bankruptcy. Schemes to deal with insolvency, to prevent people becoming bankrupt, and to prevent an insolvent being sued, are all fairly within the description of insolvency, and are none the less so because the insolvency

1943 A.C. p. 366.

(1) 7 App. Cas. 96, 109.
(2) [1915] A. C. 330, 337-340.
(3) [1898] A. C. 700, 715.
(4) [1931] A. C. 310, 326-327.
(5) [1919] A. C. 687.
(6) [1937] O. R. 265, 333.
(7) [1923] A. C. 695.

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legislated for has resulted from what may be called an emergency due to natural causes: *L'Union St. Jacques de Montreal* v. *Belisle* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *Royal Bank of Canada* v. *Larue* (3); *Reference re Companies' Creditors Arrangement Act* (4); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (5). Also, having regard to the sweeping way in which the Act of 1937 enables interference with the ordinary enforcement of obligations, it falls within the regulation of trade and commerce (s. 91 (2.)).

C. F. H. Carson K.C. for the Canadian Bankers' Association and the Mortgage Loans Association of Alberta. While the province may suggest that the reason for this legislation was the prevailing distressed condition, nevertheless it cannot stand if, when the Act is examined, it is found that the province has imperilled and, in effect, rendered nugatory the exclusive legislative authority of the Dominion over certain subjects assigned to it: *Attorney-General for Ontario* v. *Reciprocal Insurers* (6); *Attorney-General for Alberta* v. *Attorney-General for Canada* (7); *John Deere Plow Co., Ld.* v. *Wharton* (8); and *Lukey* v. *Ruthenian Farmers' Elevator Co., Ld.* (9). The Act of 1937 makes no exception with regard to chartered banks, insurance or loan or trust companies, or any other corporation which derives its capacities and powers from Dominion legislation, and, so far as such corporations are concerned, the Act of 1937 conflicts with the Interest Act, R. S. C. 1927, c. 102. If, to accomplish their purpose, the provincial legislature deals with the banking business of Canada, commerce, bills of exchange and promissory notes, and interest, they have touched on so many of the matters specified in s. 91 that the legislation cannot be said in its pith and substance to fall exclusively into a category of s. 92. It is clear that under the Act of 1937 Dominion insurance companies cannot sue an Alberta debtor, notwithstanding the powers conferred on them by Dominion legislation. They are left entirely in the hands of the board. The Act of 1937 has the effect of imperilling the status and essential capacities of banks and companies under Dominion Acts whose solvency depends on their obligations being

1943 A.C. p. 367.

(1) L. R. 6 P. C. 31, 36.
(2) [1894] A. C. 189, 200.
(3) [1928] A.C. 187, 196-197.
(4) [1934] S. C. R. (Can.) 659, 660.
(5) [1937] A. C. 391, 396.
(6) [1924] A. C. 328, 337.
(7) [1939] A. C. 117, 128-129.
(8) [1915] A. C. 330, 340.
(9) [1924] S. C. R. (Can.) 56, 71.

enforceable. The province cannot pass legislation which has the effect of depriving Dominion companies of the status and powers conferred on them by the Parliament of Canada: *Great West Saddlery Co.* v. *The King* (1); *Lukey* v. *Ruthenian Farmers' Elevator Co., Ld.* (2); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3); and, in the case of a Dominion company, the power to sue is a necessary inherent constitutional power by virtue of s. 30 of the Interpretation Act, R. S. C. 1927, c. 1. In effect, the Act of 1937 enacts that the provincial courts are not to give effect to certain Dominion civil rights: *Board* v. *Board* (4). When ss. 91 and 92 of the British North America Act are read together, the division of legislative jurisdiction discloses a definite scheme for an efficient federal economic system, and it is a proper test of legislation to inquire whether in its real essence it would have the effect of undermining the foundation of the national economic system. As to the suggestion that this legislation is justified by head (16.) of s. 92, as being purely local and private, the validity of legislation is not to be tested by the reason for an Act, but by its true character and its necessary effect: *Union Colliery Co. of British Columbia* v. *Bryden* (5). 1943 A.C. p. 368.

Barton K.C. replied.

1943. Feb. 1. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM, who stated the sections of the Act of 1937, and the questions referred as answered, and continued: Distress of a very serious nature was rife in Alberta and the adjoining prairie provinces from, at any rate, the year 1920, and divers statutes were passed in those provinces, and, in particular, in Alberta, directed to the relief of the inhabitants. In the view their Lordships have taken, it does not seem to be necessary to give even a summary of these statutes beginning with the Drought Area Relief Act (c. 43 of 1922). The Act now under consideration (to be hereafter generally referred to as "the Act") is the last of a series of legislative attempts to relieve the distress of resident farmers and others while keeping within the legislative powers of the province as laid down in the British North America Act, 1867, as amended. Their Lordships approach the important questions before them on the

(1) [1921] 2 A. C. 91, 100-123.
(2) [1924] S. C. R. (Can.) 56, 71.
(3) [1929] A. C. 260, 263-267.
(4) [1919] A. C. 956, 962.
(5) [1899] A. C. 580, 587-588.

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assumption that there was sufficient and, it may be said, grave need for legislation for the relief of distress in the province. They desire, however, to point out that the question before them is not as to the expediency, still less as to the wisdom, of the present Act. The question is simply one as to the power of the province to pass it. If the answer should be in the negative it must necessarily follow that the Dominion has full power to pass a statute dealing with the matter, or such part of it as is beyond the power of the province. It should be mentioned that the Act contains amendments designed to deal with the objection that a preceding Act encroached on the matter of "bankruptcy and "insolvency" which (under s. 91 (21.) of the British North America Act) is within the exclusive legislative authority of the Parliament of Canada. O'Connor J. had decided in favour of this objection: *North American Life Assurance Co.* v. *McLean* (1). Certain compulsory composition provisions mentioned by the learned judge are now removed, but the important provisions of s. 8 remain. The consideration of the Act (as it now stands) came before the Supreme Court of Canada in 1940 in *Winstanley's* case: *Attorney-General for Alberta* v. *Atlas Lumber Co., Ld.* (2). This was an action brought without "a permit" under the Act against a resident debtor in Alberta on a promissory note. It was there held (the judgment of Duff C.J. being concurred in by Rinfret, Crocket, Davis, Kerwin, Hudson and Taschereau JJ., affirming the judgment of Ewing J.) that s. 8 *(a)* of the Act, so far as it extends to actions on bills of exchange and promissory notes, is repugnant to the enactments of the Dominion in the Bills of Exchange Act (R. S .C. 1927, c. 16, and amendments thereto), and that the absence of a permit to bring the action was therefore not a defence.

1943 A.C. p. 369.

The Act is now under consideration in a proceeding which involves its validity as a whole. The contention on behalf of the appellant was that the Act was concerned only with matters coming within the classes of subjects enumerated in the following heads of s. 92 of the British North America Act, namely: "(13.) Property and civil rights in the "province." "(14.) The administration of justice in the "province, including the constitution, maintenance, and "organization of provincial courts, both of civil and of "criminal jurisdiction, and including procedure in civil mat-

(1) [1941] 1 W. W. R. 430. (2) [1941] S. C. R. (Can.) 87.

"ters in those courts." "(16.) Generally all matters of a "merely local or private nature in the province." The contentions of the respondents, the Attorney-General for Canada, the Canadian Bankers' Association and the Mortgage Loans Association of Alberta, which ranged over a wide ground may be stated thus: First, a denial of the contention that the Act was within any of these heads; secondly, an argument that the Act is legislation within the words "bank- "ruptcy and insolvency" in s. 91 (21.) of the British North America Act; thirdly, a claim that the Act is legislation in relation to various other subjects enumerated in s. 91 and affects (inter alia) the regulation of trade and commerce, bills of exchange and promissory notes, interest, and the status of banks and companies incorporated under the authority of the Parliament of Canada, and, fourthly, that the Act is in conflict with a number of Acts validly enacted by the Parliament of Canada.

In the view of their Lordships, there is no need, at any rate on this occasion, for any new statement as to the true construction of the British North America Act. The main propositions are now well established, and are re-stated here mainly as a matter of convenience. It is well settled that in case of conflict between the enumerated heads of s. 91 and heads of s. 92 the former must prevail. The words in s. 91, and particularly the emphatic sentence: "and for greater "certainty, but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "(notwithstanding anything in this Act) the exclusive "legislative authority of the Parliament of Canada extends to "all matters coming within the classes of subjects next here- "inafter enumerated" must be given their natural effect. The final words of the section inserted from abundant caution were these: "and any matter coming within any of the "classes of subjects enumerated in this section shall not be "deemed to come within the class of matters of a local or "private nature comprised in the enumeration of the classes "of subjects by this Act assigned exclusively to the legisla- "tures of the provinces." It follows that legislation coming in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the provincial legislatures under s. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words,

1943 A.C. p. 370.

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whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all mat-"ters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound: *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1). There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since 1894 it has been a settled proposition that, if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91, and is properly within one of the subjects enumerated in s. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation: *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). It is this proposition which, from the nature of the case, too often leads to difficulty. Legislation since 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilization. It is sometimes difficult to determine whether a particular matter, the subject of a provincial Act, is in "pith and substance" within one of the enumerated heads of s. 91, or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of s. 91 and s. 92, and, finally, there may be a doubt whether the legislative field is or is not clear. It must not be forgotten that where the subject-matter of any legislation is not within any of the enumerated heads either of s. 91 or of s. 92, the sole power rests with the Dominion under the preliminary words of s. 91, relative to "laws for the peace, order, and good government of Canada."

1943 A.C. p. 371.

Their Lordships propose now to consider the contention that the Act in its main character and object constitutes an attempt to legislate in relation to "bankruptcy and insol-"vency," the twenty-first head of subjects in s. 91. Some observations may usefully be made on the meaning of the

(1) [1898] A. C. 700, 715. (2) [1894] A. C. 189.

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words "bankruptcy and insolvency." Bankruptcy in England is a creature of the legislature, and at the date of the British North America Act (and until 1869) was available only for traders. The only relief afforded to non-traders was provided by divers Acts "for the relief of insolvent debtors." The common law, it should be remembered, permitted debtors who could not pay their debts to be committed to prison by any creditor, and the State assumed no liability to keep them from starvation. That was assumed to be left to the benevolence of any creditor who had caused the imprisonment: see Holdsworth, History of English Law, vol. viii., pp. 229 et seq. When a debtor was in difficulties there was generally an unseemly race by creditors to obtain a first charge on his property by obtaining judgments and executions. It was obviously necessary in any legislative effort to introduce a little humanity into the matter in dealing both with traders who had committed defined acts of bankruptcy and with other insolvent debtors, that is to say, all persons who were unable to pay their debts and obligations as they became due. This circumstance had been recognized in England before the passing of the British North America Act. In 1867 the statutory law of bankruptcy in England depended on the Bankruptcy Law Consolidation Act, 1849, as amended by the Bankruptcy Act, 1861, of which the full title was "An "Act to amend the law relative to bankruptcy and insolvency "in England." The collocation of the two words may be noted. Like all subsequent Acts of the same nature, the Act of 1849, as amended, aimed in substance at two things, justice to the creditors as a body and some measure of consideration to the debtor. The latter's property (speaking generally) was taken from him on adjudication and vested in trustees for the benefit (subject to certain exceptions which need not be here mentioned) of all the creditors. The bankruptcy court had large powers of examining the debtor as to his affairs. If he had acted without dishonesty and certain kinds of impropriety he would ultimately get his discharge. During the proceedings he was protected from arrest and vexatious litigation by his creditors. After obtaining his discharge he would be free from his previous liabilities (with certain exceptions) and could start in business again. The Act of 1861 also made certain provisions for non-traders and elaborate provision for the suspension of bankruptcy proceedings and for substituting a deed of

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arrangement, subject to the approval and under the control of the court, and, further, it enabled creditors to wind up a debtor's estate under a deed of composition subject to the jurisdiction of the court without taking any proceedings in bankruptcy at all: Bankruptcy Act, 1861, ss. 185 to 200. After the notice of the filing and registration of such a deed no process against the property or person of the debtor was permitted without leave of the court. The previous Acts "for the relief of insolvent debtors" were repealed: s. 230. It is manifest from a perusal of the Acts mentioned that they were passed on the assumption that the debts due to the creditors were enforceable by action and execution against the debtor and his property. That fact was one of the main reasons for the Act of 1861. Imprisonment for debt was in full operation in England: see ss. 98 to 107 of the Act of 1861. The law as to imprisonment for debt was amended by the Debtors Act, 1869. In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditors' debt and the debts provable must be debts recoverable by legal process. For example, a debt barred by the Statute of Limitations is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy: see Halsbury's Laws of England, 2nd ed., vol. ii., pp. 59 and 268.

1943 A.C. p. 373.

The Dominion Act is very similar to the English Bankruptcy Acts so far as those matters are concerned, and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words "debt due." It should be added that in the *usual* case of a moratorium proclamation the debts become payable at a certain fixed time, and, therefore, such debts are not within the above mentioned principle: *In re Sahler* (1). In the Dominion of Canada there was no general Bankruptcy Act until 1919 (Bankruptcy Act, 1919, c. 36). The existing law in the Dominion is to be found in R. S. C. 1927, c. 11, as amended by 21-22 Geo. 5, c. 17 and c. 18; and 22-23 Geo. 5, c. 39. This legislation relates both to bankruptcy and insolvency, that is, it contains provisions for vesting the property of debtors in trustees (a cessio bonorum as it is sometimes called), and also for assignments and compositions by insolvent debtors without bankruptcy. It is, however, provided that Part I. of the Act as amended, dealing with acts of bankruptcy, bankruptcy petitions and

(1) (1915) 84 L. J. (K. B.) 1275.

receiving orders, is not to apply "to wage-earners or to persons engaged solely in farming or the tillage of the soil."

In 1934 an Act entitled "The Farmers' Creditors Arrange-"ment Act, 1934," was passed by the Parliament of Canada. It is stated that it shall be read and construed as one with the Bankruptcy Act, and it provides elaborate provisions for compositions and schemes of arrangement by farmers unable to meet their liabilities as they become due. The proposals for such compositions or schemes have to come from the farmers and to be approved by the court. Powers in relation to proposals were given to "Boards of Review" not very unlike those given to the board under Parts III. and IV. of the present Act. The validity of this Act was challenged in a proceeding instituted by the Attorney-General for British Columbia, and there was an appeal from the judgment of the Supreme Court of Canada to the Privy Council: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1). The judgment of the board, delivered by Lord Thankerton, contains a full statement of the main provisions of the Act there in question. The board, affirming the decision of the Supreme Court of Canada, held that the Act was intra vires of the Dominion Parliament under s. 91 (21.). The following passage in the judgment is material to the present appeal: "Their Lord-"ships are unable to hold that the statutory conditions "of insolvency which enabled a creditor or the debtor to "invoke the aid of the bankruptcy laws, or the classes to "which these laws applied, were intended to be stereotyped "under head 21 of s. 91 of the British North America Act "so as to confine the jurisdiction of the Parliament of "Canada to the legislative provisions then existing as regards "these matters. Further, it cannot be maintained that "legislative provision as to compositions, by which bank-"ruptcy is avoided, but which assumes insolvency, is not "properly within the sphere of bankruptcy legislation" (2).

1943 A.C. p. 374.

In the opinion of their Lordships there can be no doubt as to the pith and substance of the Act. It is legislation in relation to insolvency, that is, in relation to a class of subject within the exclusive legislative authority of the Parliament of Canada. Its plain purpose is to relieve persons resident

(1) [1937] A.C. 391.
(2) (1937) A.C. 391, 402-403.

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in the province, and their estates, from an enforceable liability to pay debts incurred before July 1, 1936, and in many cases to compel the creditors to accept compositions approved by the board. This is effected by precluding persons from any access to the courts of Alberta to enforce their rights against any persons resident in the province without the permission of the board, which may never be obtained. It, no doubt, does not for all purposes destroy the rights of the creditors, but it deprives them of the remedies by which alone in the vast majority of cases those rights can be enforced. If judgments in respect of the debts in question have already been obtained it precludes or stays any proceedings by way of execution, attachment, or garnishment unless the permit of the board has been obtained. Proceedings to enforce mortgages, or other similar or analogous legal proceedings in relation to the recovery of land, are subject to the same restriction. The debts or liquidated demands may have been incurred outside the province. It is plain from many sections of the Act (e.g., ss. 6, 8, 9, 21, 23, 26 and 28) that its main purpose is to relieve resident debtors where they are unable to pay their debts as they become due. On the other hand, the board has the duty on the application of a resident debtor, or any creditor of such a person, to "endeavour to bring about an amicable arrange-"ment for the payment of the resident debtor's indebted-"ness." and to effect a settlement either in full or by a composition; and the proposed settlement is to be one by which the debts, secured or unsecured, are reduced to an amount which is in accordance with the ability of the debtor to pay presently or in the future. The board clearly has power to refuse any permit to a creditor who does not accept the settlement suggested by the board. Their Lordships agree with the Supreme Court that it is impossible to escape the conclusion that Part III. of the Act contemplates the use of the board's powers under s. 8 to enable it to secure by a method amounting to compulsion the consent of the parties to the proposed arrangement. Their Lordships also agree with the opinion expressed by the Supreme Court that, as regards debts where the creditor and the debtor reside in the province and the debt is payable in the province, the creditor is deprived of his right to present a bankruptcy petition under the (Dominion) Bankruptcy Act. For the reasons already given, fortified by a consideration of all the relevant sections

1943 A.C. p. 375.

in that Act, it must be held that in respect of an obligation to which the Act (of 1937) applies there is no "debt owing" to the creditor within the meaning of s. 4 of the Bankruptcy Act. It is not immaterial to note that the Act would be practically useless if, on its true construction, it had the result of leaving any creditor or creditors with a debt or aggregate debts amounting to five hundred dollars at liberty to present a bankruptcy petition. In their Lordships opinion, the Act of 1937 seriously interferes with the existing legislation of the Dominion.

On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court, on the one hand, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and, on the other hand, that it obstructs and interferes with the actual legislation of that Parliament on those matters. Moreover, if some of the less important provisions contained in the Act were to be regarded as merely ancillary to general Acts relating to bankruptcy and insolvency, such as those already referred to, that conclusion would not avail the appellant since, in their Lordship's view, the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency, and the provincial legislature is precluded from entering into that now occupied field: *Royal Bank of Canada* v. *Larue* (1).

Having arrived at this conclusion, it would not be in accordance with the practice of the Board for their Lordships to express their opinions on the other important matters discussed and decided in the judgment of Duff C.J., concurred in by Rinfret, Davis, Kerwin, Hudson and Taschereau JJ. On these matters their Lordships think it right to express no opinion, and they desire to adopt the observations of Lord Sumner in delivering the judgment of the board in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2) as to the difficulties in which the provincial legislatures find themselves in matters like this, and the desire of their Lordships not to appear to say anything which might restrict their authority in any case distinguishable from the present.

1943 A.C. p. 376.

(1) [1928] A. C. 187.
(2) [1929] A. C. 260.

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It should be mentioned that an argument was based on s. 39 of the Act. It is there said, in effect, that the provisions of the Act shall not be so construed as to authorize the doing of anything not within the legislative powers of the province. The section cannot, in this case at least, assist the appellant. If apart from s. 39 the Act is ultra vires it must be construed and treated as such; it remains a nullity, and the section is plainly inoperative. Their lordships' attention was called to the fact that a result of the Act's total invalidity would be that the protection afforded by s. 11 would disappear, and that rights which, in view of the Act, had not been enforced might have become time-barred. The hardship and injustice of such a result are undeniable, but they can only be avoided by an Act of the legislative assembly of the province of Alberta.

In the result, the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed, without costs, and that the opinion of the Supreme Court should be affirmed.

Solicitors for appellant, for Attorney-General for Saskatchewan, and for the intervenants, Attorneys-General for Manitoba, Ontario and New Brunswick: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Canadian Bankers' Association and the Mortgage Loans Association of Alberta: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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ABITIBI POWER AND PAPER COMPANY, LIMITED..... APPELLANT;

July 8.

AND

MONTREAL TRUST COMPANY AND OTHERS..... RESPONDENTS.

ATTORNEY-GENERAL FOR ONTARIO. INTERVENER.

1943 A.C. p. 536.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Provincial legislation—Validity—Company—Winding-up order—Mortgagee's action to enforce security—Liberty to proceed notwithstanding winding-up order—Moratorium legislation staying all proceedings—Act regulating "property and civil rights in province"—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (21.); *s.* 92 (13.)—*Abitibi Power and Paper Company Limited Moratorium Acts*, 1941 *and* 1942, *of Ontario.*

While a mortgagee's action against the appellant company to enforce the security by sale of the company's property, assets and undertaking was pending in the provincial court in Ontario an unsecured creditor obtained court orders adjudicating the company bankrupt and for its winding-up under the Winding-up Act, a Dominion Act (R. S. C., 1927, c. 213), which, by s. 21, stays all proceedings after the winding-up order except with leave of the court. Thereafter, on the application of the mortgagee, an order was made under the Winding-up Act of the Dominion by the provincial court in Ontario, which acted in that capacity as a dominion court exercising dominion jurisdiction, allowing the mortgagee's action to proceed notwithstanding the winding-up order. Subsequently, the Ontario legislature passed a Moratorium Act which provided (inter alia) that no new action should be brought for the purpose of realizing on the mortgage and no further step taken in the action then pending without the consent of the Attorney-General. On a claim by the mortgagee that the Moratorium Act was ultra vires the provincial legislature:—

1943 A.C. p. 537.

Held, that the mortgagee's action, although continued by leave of the winding-up court, never became a proceeding in the winding-up, and that the temporary interference with it by the legislature to which it was subject did not carry it into the field of "bankruptcy and insolvency," which were matters within the exclusive legislative competence of the dominion parliament under s. 91 (21.) of the British North America Act, 1867; but that the pith and substance of the Moratorium Act was to regulate "property and civil rights within the province," and it was, therefore, intra vires the legislature of the province under s. 92 (13.) of the British North America Act.

Judgment of the Court of Appeal for Ontario, [1942] O. R. 183, reversed.

APPEAL (No. 58 of 1942) from a judgment of the Court of Appeal for Ontario (March 21, 1942), affirming an order of the Supreme Court of Ontario (December 4, 1941) which had

* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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directed the sale by public auction, subject to a reserve bid, of the property, assets and undertaking of the appellant company, the Abitibi Power and Paper Co. Ld.

The following facts are taken from the judgment of the Judicial Committee. The appellant company was incorporated in 1914 by letters patent of the Dominion of Canada to acquire the undertaking of the existing company, the Abitibi Pulp and Paper Co. In 1928 it made an issue of first mortgage gold bonds, due 1953, of which in 1932 $48,267,000, with interest at five per cent., were outstanding. The bonds were charged on the whole property and undertaking of the company. There were also issued: $1,000,000 in 10,000 shares of seven per cent. cumulative preferred stock; $34,818,000 in 341,818 shares of six per cent. cumulative preferred stock; 1,088,117 common shares of no par value, on which the book value placed was $18,964,933. Subsidiary companies, in which the appellant company owned the majority of shares, also carried on similar businesses in Manitoba and Quebec. The gold bonds were secured by a trust deed in ordinary form, dated June 1, 1928, made between the appellant company and the present respondents, the Montreal Trust Co., whereby the company mortgaged and charged the whole of its property and undertaking to the trust company in trust for the holders of the first mortgage gold bonds. In 1932 the appellant company made default in payment of the half-yearly instalment of interest due on June 1, and thereupon, in pursuance of a power in the trust deed, the Montreal Trust Co., by writ issued on September 8, 1932, commenced the ordinary debenture holders' action claiming administration of the trusts of the debenture trust deed, a declaration that the indenture and mortgage were a first charge on the undertaking of the company, to have an account of what was due on the mortgage, to have the undertaking property and assets of the company sold under the direction of the court, and for the appointment of a receiver and manager. On September 10, 1932, Riddell J.A. appointed G. T. Clarkson receiver and manager of the undertaking, and gave leave to named members of a bondholders' committee to attend the proceedings. Subsequently, those persons, or some of them, were by order of Middleton J.A., dated September 13, 1935, added as defendants in the action, and were respondents to the present appeal in addition to the trust company. On September 15, 1932, an

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unsecured creditor, Canada Packers, Ld., filed a petition in bankruptcy against the appellant company, and on September 26, on the application of the same creditor, Sedgewick J. made four consecutive orders: (1.) Granting leave to the creditor to proceed against the company under the provisions of the Bankruptcy Act and/or the Winding-up Act, and confirming the petition dated September 15. (2.) On the creditor's petition adjudicating the company bankrupt, making a receiving order against it, and appointing a custodian of the estate. (3.) Granting leave to the creditor to apply for a winding-up order against the company. (4.) On the petition of the creditor declaring that the company was insolvent, and ordering it to be wound up. On November 25, 1932, F. C. Clarkson was appointed liquidator of the company, and so acted until December 20, 1935, when he resigned, R. S. McPherson being appointed in his place. The Winding-up Act (a Dominion Act, R. S. C., 1927, c. 213, s. 21) provides: "After the winding-up order is made, no "suit, action or other proceeding shall be proceeded with or "commenced against the company, except with the leave of "the court and subject to such terms as the court imposes." The court referred to was the appropriate provincial court acting in that capacity as a dominion court with dominion jurisdiction. On December 7, 1932, the following order was made by Garrow J.:

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"In the Matter of the Winding-up Act, being c. 213 "of the Revised Statutes of Canada, 1927, and Amending "Acts, and In the Matter of Abitibi Power and Paper "Co., Ld.

"1. Upon the application of counsel for Montreal Trust "Company, the plaintiff in an action commenced in this court "on September 8, 1932, against the above named Abitibi "Power and Paper Co., Ld., for the enforcement of the trusts "and security of a certain deed of trust and mortgage, dated "as of June 1, 1928, made by the said Abitibi Power and "Paper Co., Ld., in favour of the said Montreal Trust Co. "and the National City Bank of New York as trustees, in the "presence of counsel for F. C. Clarkson, Esq., the liquidator "appointed herein, upon reading the writ of summons in the "said action and upon hearing what was alleged by counsel "aforesaid.

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"2. IT IS ORDERED that the said Montreal Trust Co. shall "be at liberty to proceed with the said action against the "said Abitibi Power and Paper Co., Ld., notwithstanding the "winding-up order made herein September 26, 1932.

"D'ARCY HINDS,

"Registrar, S.C.O."

Thereupon, the action proceeded leisurely as negotiations from time to time took place for a reconstruction, and it was not till February 15, 1937, that the statement of claim was delivered claiming the relief mentioned in the writ. On September 16, 1937, the appellant company delivered its defence, alleging on various grounds that the charge was not valid, and disputing the jurisdiction of the provincial court save for the purpose of determining the validity of the charge. On November 3, Kingstone J., on the trial of the suit, declared the charge valid and gave liberty to apply as to any further directions. On June 10, 1940, Middleton J.A., on motion of the trust company, ordered a sale of the appellant company's undertaking under the direction of the master, and gave leave to any bondholder to bid. In October the master reported that he had received two bids of $30,000,000 and $40,000,000. The latter he rejected as not complying with the conditions of sale, but he reported that neither bid was equal to the reserve which he had fixed. The sale, therefore, proved abortive. On November 1, 1940, a Royal Commission was appointed by Order in Council in Ontario, consisting of three commissioners "to inquire into the "affairs and financial and corporate structure of the [appel-"lant company with a view to recommending an equitable "plan for solving the financial difficulties of the company so "that the company may be in a position to meet conditions, "regulations, and restrictions which the Lieutenant-Gover-"nor in Council may consider necessary upon the grant or "renewal of the hereinbefore recited leases, licences, water "power rights, flooding rights, licences of occupation and "other rights, powers or privileges; and generally to make "such recommendations in the premises as appear to be in "the best interests of all parties concerned, including the "province of Ontario." On March 17, 1941, the commission reported. They criticized the present dominion legislation in so far as it dealt with schemes of reconstruction of such large concerns as the present, they stated that the govern-

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ment and the public had a huge stake in the pulp and paper industry and that no price could be obtained for the undertaking and assets under present conditions which would begin to approach the amount of the outstanding bonds with interest thereon, and they outlined a plan whereby the maturity of the bonds was extended for twenty-five years with provisions for maintaining the right of the bondholders and, in the absence of default, for payment by instalments of some portion of the ordinary creditors' claims. They recognized that to secure that object recourse would have to be had to dominion legislation. Meantime, on November 25, 1940, the trust company had given a further notice of motion for sale which was ordered to stand over pending the report of the Royal Commission. After the report of the Royal Commission the legislature of Ontario, on April 9, 1941, passed the Abitibi Power and Paper Company Limited Moratorium Act. It recited the various motions for sale, a summary of the report of the Royal Commission, and, finally: "whereas it is deemed desirable to stay any action "now pending or that may hereafter be taken under the "provisions of the above-mentioned bond mortgage for the "sale of all the property and assets of the said company situ-"ate in Ontario in order that an opportunity may be given to "all parties concerned to consider the plan submitted in the "report of the said Royal Commission," and then it proceeded to enact (s. 1) that, so far as any property in Ontario was concerned, no further proceedings should be taken or continued under the order of Middleton J.A. of June 10, 1940. [That, in fact, was already exhausted]; (s. 2) that, without the consent of the Attorney-General, no new action should be brought for the purpose of realizing on the mortgage and no further step should be taken in the action then pending. The Act was to come into force on a day to be named by the lieutenant-governor, and by Order in Council its operation might be determined at any time, but otherwise it was to remain in force until December 31, 1942. On October 9, 1941, the notice of motion for sale which was then standing over was renewed, and on the same day the lieutenant-governor made a proclamation bringing into force the Moratorium Act. On October 17, the trust company gave notice that at the hearing of the motion for sale the validity of the Moratorium Act would be disputed on the ground that it dealt with matters that fell under the head "Bank-

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"ruptcy and Insolvency" in s. 91 (21.) of the British North America Act, 1867. The motion was heard on November 27, 1941, by Middleton J.A., who, in a considered judgment, given on December 4, 1941, held that the Act was ultra vires, and ordered the sale of the property and assets of the company to take place under the direction of the master and subject to a reserve bid, with liberty to the bondholders to bid. On appeal, that order was affirmed by the Court of Appeal (Riddell, Fisher, Henderson JJ.A., and Hogg J., Gillanders J.A. dissenting). The appellant company appealed.

1943. May 27, 28, 31; June 1. *Sir Walter Monckton K.C.* and *Gahan* for the appellant company. The Moratorium Act, when its true nature and character are examined, is in pith and substance legislation in relation to property and civil rights in the province, and, accordingly, within the competence of the provincial legislature under s. 92 (13.) of the British North America Act, 1867. The property is the property of the company in Ontario, and the civil right is the trust company's right to enforce the security under the directions of the provincial court. The Moratorium Act is not on its face or in substance bankruptcy or insolvency legislation, which is normally concerned with the rateable distribution of assets. This Act has no concern with that matter. The trust company's action, in which the Act intervened, was released from the administration of bankruptcy and insolvency legislation by the order under s. 21 of the Winding-up Act of the Dominion, and the trust company was left free of intervention by the Dominion to conduct the case subject to all the incidents of an ordinary case in the Ontario courts. It is within the legislative competence of the province to pass a moratorium Act, whether general or particular. In *Day* v. *City of Victoria* (1), a moratorium Act was held intra vires the province as dealing with property and civil rights, and that case was mentioned with approval in *Board of Trustees of Lethbridge Northern Irrigation District* v. *Independent Order of Foresters* (2). The following authorities show that, if a provincial Act is in pith and substance in relation to a head of s. 92 of the British North America Act—in this case "property and civil rights"—it is valid notwithstanding that it may be designed to remedy a condition of threatened or

1943 A.C. p. 542.

(1) [1938] 3 W. W. R. 161, 177. (2) [1940] A. C. 513, 532.

actual insolvency: *L'Union St. Jacques de Montreal* v. *Belisle* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion of Canada* (2); *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (3); *Royal Bank of Canada* v. *Larue* (4); *Reference re Companies' Creditors Arrangement Act* (5); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (6); and *Ladore* v. *Bennett* (7). The last-named case, apart from *Day* v. *City of Victoria* (8), is the most material, and shows that the mere fact that insolvency was picked out as a reason for dealing in a particular way with an unsuccessful institution, did not colour the legislation as relating to insolvency so as to make it fall under s. 91 (21.) of the British North America Act. [Reference was also made to *Attorney-General for Alberta* v. *Attorney-General for Canada* (9).] If the whole subject-matter of the legislation is not covered by "property and civil rights within the province," or by s. 92 (5.) of the British North America Act, which deals with "the management and sale of public lands belonging to the province and the timber and wood thereon," it falls within "the administration of justice within the province" under s. 92 (14.), which includes procedure in civil courts. A moratorium Act is procedural law: *Huber* v. *Steiner* (10).

1943 A.C. p. 543.

Barton K.C. and *Gahan* for the Attorney-General for Ontario (intervener). This case turns entirely on the effect of s. 21 of the Winding-up Act, and that section, when put into operation, does no more than remove a particular barrier imposed by the Bankruptcy Act, and leaves the mortgagee's action free to proceed subject to provincial control. It is an unqualified leave. This Moratorium Act does not relate to bankruptcy and insolvency. It deals with a provincial action for specific reasons and with certain definite aims, and it is legislation which is entirely within the provincial field as coming within the classes of subjects assigned exclusively to the provincial legislature by s. 92 (5.), (13.), (14.) and (16.) of the British North America Act, the last being: "Generally all matters of a merely local or private nature in

(1) (1874) L. R. 6 P. C. 31.
(2) [1894] A. C. 189.
(3) [1898] A. C. 700, 714.
(4) [1928] A. C. 187, 192, 196.
(5) (1934) S. C. R. (Can.) 659.
(6) [1937] A. C. 391, 397, 402.
(7) [1939] A. C. 468, 480.
(8) [1938] 3 W. W. R. 161, 177.
(9) [1943] A. C. 356, 374.
(10) (1835) 2 Bing. N.C. 202, 210.

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"the province." [*Merchants Bank of Canada* v. *Eliot* (1) was referred to.]

Pritt K.C. and *Devlin* for the trust company. First, in pith and substance the Moratorium Act is legislation dealing with bankruptcy and insolvency. Secondly, if the Act does fall within a head of s. 92, and not within a head of s. 91, but touches bankruptcy and insolvency only incidentally, then, the field in regard to bankruptcy and insolvency being occupied by the Dominion, the latter must prevail. The principles applicable to the construction of ss. 91 and 92 of the British North America Act are summarized in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). This is in pith and substance an Act to stay, at least temporarily, proceedings for the realization by a creditor of certain assets of an insolvent bankrupt company which is being wound up because it is insolvent under dominion legislation with a view to the company's possible reconstruction or to modifying and improving the realization or nursing the assets and postponing for that purpose the time and manner of their ultimate distribution among the various classes of creditors in some reconstruction outside the winding-up. The power to interfere with an action for reasons of bankruptcy and insolvency vests in the Dominion. They have exercised it under s. 21 of the Winding-up Act in a particular way, but they can exercise it repeatedly by appropriate legislation, and because the Dominion can do it the province cannot. The tendency of the decisions of this Board has been to interpret "bankruptcy "and insolvency" widely: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3). The phrase now covers any provisions which parliament chooses to make, excluding anything colourable or indirect, to deal with any of the problems of persons who are insolvent debtors or the creditors of insolvent debtors: *Cushing* v. *Dupuy* (4). *Ladore* v. *Bennett* (5) is distinguishable, for the Act there dealt with the affairs of a municipal institution which is directly within s. 92 (8.), and it did not even trench on insolvency. The suggested approval of *Day* v. *City of Victoria* (6) in the *Lethbridge* case (7) is, it is submitted, rather an absence of

1943 A.C. p. 544.

(1) [1918] 1 W. W. R. 698.
(2) [1943] A. C. 356, 369.
(3) [1937] A. C. 391, 402.
(4) (1880) 5 App. Cas. 409, 415.
(5) [1939] A. C. 468.
(6) [1938] 3 W. W. R. 161.
(7) [1940] A. C. 513.

disapproval than actual approval. The property of the company is being administered under the Winding-up Act on the basis and for the reason of insolvency, and the civil right of the trust company to enforce its security can be restricted, controlled, affirmed or destroyed within the scope of bankruptcy and insolvency by dominion authority alone. Assuming that the Moratorium Act deals with property and civil rights, it still infringes bankruptcy and insolvency because it stays actions for the purpose of restoring a company, and that is the function of bankruptcy and insolvency. With regard to "administration of justice" (s. 92 (14.)), this case is not true procedure: *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). It deals with substantive matters.

Charles Romer K.C. and *Crispin* for respondent members of the bondholders' committee, adopted the argument for the trust company. The whole pith and substance of the Moratorium Act in the light of all the circumstances is bankruptcy and insolvency, and the fact that for another purpose or in another aspect it could be property and civil rights does not alter that: *John Deere Plow Co., Ld.* v. *Wharton* (2); *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). The conditions on which secured creditors of an insolvent company may be compelled to accept a compromise of their rights have been clearly defined by dominion legislation, but, although that legislative field has been fully occupied by the Dominion, the Moratorium Act in question here purports to impose further interference, inasmuch as, in the absence of the consent of the Attorney-General for Ontario, the secured creditors are debarred from proceeding to enforce their security during the prescribed period. 1943 A.C. p. 545.

Sir Walter Monckton K.C. in reply, referred to *Attorney-General for Alberta* v. *Attorney-General for Canada* (3).

July 8. The judgment of their Lordships was delivered by LORD ATKIN, who stated the facts, and continued: The question in the case is the validity of Acts of the Ontario legislature, the Abitibi Power and Paper Company Limited Moratorium Act, 1941, and a further Act, the Abitibi Power and Paper Company Limited Moratorium Act, 1942. As

(1) [1943] A. C. 356. (2) [1915] A. C. 330, 338.
(3) [1939] A. C. 117, 130.

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may be seen from the capital structure, the appellant company was a vast undertaking, dependent for its supply of pulp wood on the Crown lands of the province of Ontario, which it obtained under agreements for twenty-one years, and dependent for its water power on leases and licences from the Crown. A convenient summary of the position is given by Robertson C.J. (Ontario) in his judgment giving leave to appeal in the present case (1): "An essential part of the "property covered by the mortgage consists of leases, licences, "agreements, water power rights, privileges, franchises and "concessions granted by the province of Ontario. As is "stated in the report of a Royal Commission that inquired "into the affairs of the [appellant] company, whose report is "before us and was referred to in argument, 'Abitibi is " 'dependent for its supply of pulpwood upon the Crown " 'lands of the province of Ontario. It also requires large " 'quantities of power, in respect of which it is dependent " 'upon leases from the province.' These licenses, leases and "other rights are granted in most, if not in all, cases for fixed "terms of years, and some of these have expired or are about "to expire. As to some others the company is in default "either in payment or in the performance of its covenants. "If the province of Ontario should exercise its rights strictly, "the mortgaged premises would hardly be saleable at any "price. Mills in which large sums of money are invested "would be worthless without power to run them or pulpwood "to supply them. In the report of the Royal Commission to "which I have referred there is set forth a long list of "the [appellant] company's further requirements from the "province, as given by the receiver. No doubt, the province "is in the habit of co-operating fairly with persons who invest "their money in establishing and developing industries on "the lands of the Crown and in opening them up to settlement "and improving them, but when, as here, there may be "danger that many persons who have invested largely will "lose their investment, the government of the province may "have some concern. It may well be that on a sale for cash "none but bondholders who can turn in their bonds in pay- "ment will be in a position to buy, especially in view of the "difficulty of raising large amounts of capital for such invest- "ment in war time. To avoid a result that may wipe out "the investment of a great many people and that in such an

1943 A.C. p. 546.

(1) [1942] O. R. 321, 337.

"event may cause some embarrassment to the government "in dealing with the property rights and interests of the "province, it is, to say the least, understandable that the "proposed sale for cash should be the subject of some concern "to the legislature, whatever opinion one may have as to the "power of the legislature to enact the statute in question."

Up to the time, on September 10, 1932, when Riddell J.A. appointed a receiver and manager of the undertaking of the appellant company the action was plainly a mortgagee's action brought in the courts of Ontario, affecting property in Ontario and the civil rights of the mortgagee, and subject to the exclusive authority of the provincial courts and the provincial legislature. It has to be determined how far, if at all, this position was altered by the subsequent proceedings. The objection to the Moratorium Act that was expressed by Middleton J.A. and by the members of the Court of Appeal may be summarized by saying that leave to continue the action had been given under the powers of the Dominion Act (Winding-up Act, s. 21), and that the legislature could not thereafter interfere with the proceedings in the action without encroaching upon the exclusive dominion powers to legislate on the class of subjects: "bankruptcy and insol- "vency." The right to take away the cause of action, said Fisher J.A., is vested in the Dominion unless the Dominion has not seen fit to deal with it, and s. 21 of the Winding-up Act does deal with it. Henderson J.A. went further and was of opinion that legislation in the province passed in respect to property and civil rights in the province must not be legislation aimed at a particular firm or corporation but must be general in character. "The legislature is not competent "to deny access to His Majesty's courts in an individual "case."

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Their Lordships are unable to agree with the decision in the Ontario courts. It has to be remembered that this action, when commenced, was subject solely to the laws of the province which at any time, in pursuance of the sovereign power entrusted to the legislature in this respect, might be altered as the legislature thought fit. When the company was ordered to be wound-up the bondholders might, in pursuance of ss. 78 to 84, claim in the winding-up as secured creditors. They would in that case have had to put a specified value on the security, and the liquidator could have consented to the retention by the creditors of their security

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or could have required the transfer to him at the specified value to be paid out of the estate when he had realized the security. The bondholders in this case made no claim at all in the winding-up. Their security was known to be insufficient to meet the mortgage debt and they deliberately remained outside and proceeded to continue to exercise what may be called their provincial rights against the provincial property. They were required by s. 21 of the Winding-up Act to get leave to continue their action, a provision which is not directed to secured creditors alone, but is applicable to all claims against the company, whether in contract, or tort, or otherwise. In view of the circumstances, the leave to proceed was ex debito justitiae. The court could not rightly have refused it. Once granted, the action proceeded as a provincial action, subject to the provincial law regulating the rights in such an action and subject to the sovereign power of the legislature to alter those rights in respect of property within the province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position, but he expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant. Their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The province, therefore, could enact rules in the course of the action imposing a further ground of stay, and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor, or to one particular action or suitor. There appears to be no authority, and no reason for the opinion, that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public

1943 A.C. p. 548.

authority for public purposes. The legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not, in any case, subject to control by the courts. The short answer, therefore, to the contentions of the trust company is that the action, though continued by leave of the winding-up court, never became a proceeding in the winding-up, and that the temporary interference with it by the legislature to which it was subject was not an intrusion into the field of bankruptcy and insolvency.

It was pressed on their Lordships that the real substance of the legislation was an attempt to coerce the bondholders into accepting a plan of reconstruction, and that arrangements such as were contemplated by the report of the Royal Commission were within the exclusive field of dominion legislation. So they are, but this Board must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself. In the present case their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble to the Act, that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission. That the Act was renewed in March, 1942, by another temporary Act expiring in June, 1943, affords no reason for modifying this view, nor does the fact that the plan suggested by the Royal Commission involves recourse to dominion legislation. The pith and substance of this Act is to regulate property and civil rights within the province. It was contended that the Act was passed in relation to the management and sale of the public lands belonging to the province and of the timber and wood thereon, but, in view of what has been said on the topic of property and civil rights in the province, it is unnecessary to discuss this further ground for supporting the validity of the Act.

1943 A.C. p. 549.

A preliminary objection was taken to the regularity of the order of the Court of Appeal on the ground that the case did not fall within s. 1 of the Privy Council Appeals Act, R. S. O., 1937, c. 98, giving an appeal where the matter in controversy in any case exceeds the sum or value of $4000. It was said that the order under appeal was an interlocutory order, and the appeal was granted because there were exceptional

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circumstances by reason of the importance of the constitutional question. Their Lordships intimated at once that, if necessary, in view of the constitutional question they would give leave to file a petition for special leave in favour of which they would report, and counsel for the trust company very reasonably did not further press the objection. Their Lordships are, however, satisfied that the order in question, which forms one of the final orders asked for in the statement of claim, whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of $4000. If a litigant is to be deprived by order of the court of any rights over a property worth $30,000,000, as he is by an order of sale to which he objects, it would appear reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of $4000. On this ground, the preliminary objection fails.

For these reasons the appeal should be allowed, the orders of Middleton J.A. and the Court of Appeal should be set aside, and the motion for sale should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The trust company must pay the costs of the appellant company in the Ontario courts and on this appeal.

Solicitors for appellant company and for the intervener: *Blake & Redden.*

Solicitors for trust company: *Lawrence Jones & Co.*

Solicitors for individual respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J.C.* 1943 July 30.

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ATLANTIC SMOKE SHOPS, LIMITED . . APPELLANTS;

AND

CONLON AND OTHERS . . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (New Brunswick)—Provincial legislation—Constitutional validity—"Direct taxation within the province"—Percentage of retail price—Payable by last purchaser, principal or agent—Tobacco Tax Act, 1940 (4 *Geo.* 6, *c.* 44), *of New Brunswick—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92 (2.), *ss.* 121, 122.

The Tobacco Tax Act, 1940, of New Brunswick, which provides by s. 4 that a tax of ten per cent. of the retail price shall be paid at the time of making the purchase by anyone who buys tobacco for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province, and that the tax is to be paid by an agent where he purchases on behalf of a principal, and by s. 5 that, if a person residing or carrying on business in New Brunswick, brings tobacco into the province or receives delivery of it there for his own consumption he, or his agent, if the transaction is so effected, shall pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the province, is in all respects a valid exercise of the powers of the provincial legislature under head (2.) of s. 92 of the British North America Act, 1867, as constituting "direct taxation "within the province." The tax, which is to be paid by the last purchaser of the article, the money for it being found by the individual who finally bears the burden of it, satisfies John Stuart Mill's test for a direct tax—"one which is demanded from the very persons who it is intended or "desired should pay it"—the use of which in interpreting the phrase "direct taxation" in head (2.) of s. 92 of the Act of 1867 has long been firmly established and is fully justified. Further, the tax, being demanded from the very persons who it is intended or desired should pay it, is none the less direct even if it may be described as an excise tax.

Bank of Toronto v. *Lambe* (1887) 12 App. Cas. 575, 582; *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* [1934] A. C. 45, 55, referred to.

When the purchase is made by an agent acting for his principal the tax nevertheless remains "direct," being paid by the agent for and on behalf of his principal who really bears it, and the production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco. 1943 A.C. p. 551.

Held, also, that s. 5 of the Tobacco Tax Act does not impose a customs duty, the tax being a direct one on the consumer, and is not invalid as amounting to an attempt to tax in disregard of the restrictions contained in ss. 121 and 122 of the Act of 1867.

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* *Present:* VISCOUNT SIMON L.C., VISCOUNT SANKEY, VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD ROMER.

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Attorney-General for British Columbia v. *Kingcome Navigation Co.* [1934] A. C. 45, at p. 59; and *Gold Seal, Ld.* v. *Attorney-General for Alberta* (1921) 62 S. C. R. (Can.) 424, 439, referred to.

Judgment of the Supreme Court of Canada [1941] S. C. R. (Can.) 670, varied.

APPEAL (No. 19 of 1942), by special leave, from a judgment of the Supreme Court of Canada (October 7, 1941) which, by a majority, had declared that the Tobacco Tax Act, 1940, of New Brunswick (1) was within the constitu-

1943 A.C. p. 552.

(1) By Tobacco Tax Act, 1940, s. 2: "In this Act, unless the context "otherwise requires, *(a)* 'consumer' "or 'consumer of tobacco' means any "person who, within the province, "purchases from a vendor tobacco at "a retail sale in the province for his "own consumption or for the con- "sumption of other persons at his "expense or who, within the province, "purchases from a vendor tobacco at "a retail sale in the province on be- "half of or as agent for a principal who "desires to acquire such tobacco for "consumption by such principal or "other persons at the expense of "such principal. *(b)* 'Minister' "means the Provincial Secretary- "Treasurer. *(c)* 'Package' means "package, box, tin or other container "in which tobacco is contained or "sold. *(d)* 'Purchaser' means any "person who, within the province, "purchases from a retail vendor "tobacco at a retail sale in the "province. *(e)* 'Retail sale' means "a sale to a consumer for purposes "of consumption and not for resale. "*(f)* 'Retail vendor' means any "person who, within the province, "sells tobacco to a consumer. *(g)* " 'Tobacco' means tobacco in any "form in which tobacco is consumed "and includes snuff. *(h)* 'Vendor' "includes both wholesale vendor and "retail vendor. *(i)* 'Wholesale ven- " dor' means any person who, within "the province, sells tobacco for the "purpose of resale."

Sect. 3: "(2.) No person shall sell "any tobacco in the province at a "retail sale unless he holds a retail "vendor's licence issued to him under "authority of this Act and such "licence is in force at the time of sale. "(4.) Vendor's licences and such "other licences as may be prescribed "by the regulations shall be issued "annually by the minister upon "payment of such fee or fees as may "be required by the regulations. "All licences shall expire on the "thirtieth day of June following the "issue thereof. (5.) The minister "may cancel or suspend any licence "for failure to comply with any of the "provisions of this Act."

Sect. 4: "Every consumer of "tobacco purchased at a retail sale "in the province shall pay to His "Majesty the King in the right of the "province for the raising of a revenue, "at the time of making his purchase, "a tax in respect of the consumption "of such tobacco, and such tax shall "be computed at the rate of ten per "centum of the retail price of the "tobacco purchased."

Sect. 5: "Every person residing or "ordinarily resident or carrying on "business in New Brunswick, who "brings into the province or who "receives delivery in the province of "tobacco for his own consumption or "for the consumption of other persons "at his expense or on behalf of or as "agent for a principal who desires "to acquire such tobacco for con- "sumption by such principal or "other persons at his expense shall "immediately report the matter to "the minister and forward or produce "to him the invoice, if any, in respect "of such tobacco and any other "information required by the minister "with respect to the tobacco and "shall pay the same tax in respect of "the consumption of such tobacco as "would have been payable if the

tional powers of the province with the exception of the provisions thereof making an agent liable for the tax, and had dismissed an appeal from a judgment of the Supreme Court of New Brunswick (Appeal Division) (December 3, 1940) which on a special case had found the Act in its entirety to be within the constitutional powers of the province as being "direct taxation within the province" under head (2.) of s. 92 of the British North America Act, 1867.

The special case stated (inter alia) that the appellants were a Dominion company, having their head office in the city of St. John, in New Brunswick; that on October 15, 1940, they opened a store in that city where they carried on the business of selling tobacco, including cigars and cigarettes, without having obtained any licence so to do under the Tobacco Tax Act or the regulations made thereunder; that the appellants sold at retail tobacco manufactured in provinces of Canada other than New Brunswick to persons defined by s. 2 *(a)* of the Act as "consumers" or "consumers of tobacco" without collecting the tax imposed by the Act; that the first respondent, James H. Conlon, was, on the coming into force of the Act, appointed Tobacco Tax Commissioner; that, on November 2, 1940, and from time to time thereafter, the second respondent, John McDonough, an inspector appointed under the Act, and others, while acting under the instructions of the other respondents, entered on the appellant's premises and proceeded to ask customers whether they had paid the provincial tax on the tobacco purchased by them, to request them to produce their tobacco tax receipt, and to demand their names and addresses; and that the question for the opinion of the court was whether the Act, or any of the provisions thereof, and the regulations made thereunder, or any of them, were ultra

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"tobacco had been purchased at a "retail sale in the province at the "same price."

Sect. 10: "A consumer shall be "and remain liable for the tax "imposed by this Act until the same "has been collected."

By s. 92 of the British North America Act, 1867: "In each province "the legislature may exclusively "make laws in relation to matters "coming within the classes of sub-"jects next hereinafter enumerated, "that is to say: . . . . 2. Direct "taxation within the province in "order to the raising of a revenue "for provincial purposes."

By s. 121: "All articles of the "growth, produce, or manufacture "of any one of the provinces shall, "from and after the Union, be "admitted free into each of the other "provinces."

By s. 122: "The customs and excise "laws of each province shall, subject "to the provisions of this Act, con-"tinue in force until altered by the "Parliament of Canada."

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vires the legislature of New Brunswick, and, if so, in what particular or particulars. The third respondent was the Attorney-General for New Brunswick. The individual opinions of the judges in the courts below appear from the judgment of the Judicial Committee.

1943. May 4, 6, 10, 11, 13, 14, 17, 18, 20, 21, and 24. *Pritt K.C.* and *Holroyd Pearce* for the appellants. The appellants rely on four propositions: (i.) This is not direct taxation because it is a sales tax, and a sales tax is an excise tax and, therefore, indirect. Moreover, this is a tax on a transaction or a commodity. It is not direct taxation because it is capable of being passed on. It is certainly indirect taxation so far as it deals with the agent. (ii.) If it is not a sales tax, but is rather a consumption tax, then it is not taxation "within the province," because it is levied regardless of where the consumption may take place. (iii.) Sect. 5 is bad as being *(a)* legislation relating to customs and excise, *(b)* as infringing s. 121 of the British North America Act, 1867, and *(c)* as the regulation of trade and commerce, which brings s. 5 under s. 91 of the Act of 1867. (iv.) If the provisions for taxing the agent, or the rest of the provisions of s. 5, are invalid and ultra vires, they are not severable, because without them the Act could scarcely achieve its purpose, and it cannot be assumed that the legislature would have meant to pass in its truncated form an Act which probably would not work. The following authorities deal with direct and indirect taxation: *Attorney-General for Quebec* v. *Queen Insurance Co.* (1); *Attorney-General for Quebec* v. *Reed* (2); *Bank of Toronto* v. *Lambe* (3); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (4); *Cotton* v. *Regem* (5), in which Lord Moulton quotes John Stuart Mill's test for a "direct" tax as being "one which is demanded from the "very persons who it is intended or desired should pay it," and an "indirect" tax as one demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (6); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (7); *City of Halifax* v.

1943 A.C. p. 554.

(1) (1878) 3 App. Cas. 1090.
(2) (1884) 10 App. Cas. 141.
(3) (1887) 12 App. Cas. 575, 581.
(4) [1897] A. C. 231, 235.
(5) [1914] A. C. 176, 189, 193.
(6) [1925] A. C. 561.
(7) [1927] A. C. 934.

Fairbanks' Estate (1), one of the two most important cases from the appellant's point of view; *Rex* v. *Caledonian Collieries* (2); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (3); *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (4); and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.* (5). The cases show that a tax on the purchase of a commodity imposed at the time of the purchase and with respect to the commodity purchased is an indirect tax. *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (6), where the province imposed a tax on fuel oil consumption which was paid by the consumer because he was the consumer and not in relation to any dealings with the commodity, is distinguishable. There was there no definition of "consumer." If the *Kingcome* case (6) appears to infringe the principle that a sales tax is an indirect tax, the answer is that it was not necessary to say that the tax in that case was not a tax of that class at all. The Board were sailing in narrow waters. Further, this is a tax which is reasonably capable of being passed on, *(a)* by resale in the province where the purchaser changes his intention and decides not to smoke the tobacco, and *(b)* by resale anywhere in the dominion outside the province, or even outside the dominion, where the tobacco is dearer than the price paid for it. With regard to the second proposition—that this is not taxation "within the province"—the actual consumption sought to be taxed, even if the taxation is "direct," is consumption anywhere in the world and that is extra-provincial legislation and must be bad. Sect. 5 of the Act is attacked as relating to customs and excise and as offending against s. 121 of the British North America Act, 1867, which provides that all articles of the growth, produce or manufacture of any of the provinces shall be admitted free into each of the other provinces. Sect. 5 cannot possibly live, and the statute without it, and without the provisions about agents, is wholly unworkable, and, therefore, the whole Act must go. The Act trespasses on the exclusive legislative power of the Dominion of Canada to impose duties of customs and excise. Further, s. 5 regulates the passage of trade between one province and another, and

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(1) [1928] A. C. 117.
(2) [1928] A. C. 358.
(3) [1930] A. C. 357.
(4) (1931) S. C. R. (Can.) 357, 362, 373.
(5) [1933] A.C. 168, 173, 175-176.
(6) [1934] A. C. 45. 58-59.

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so falls within the express dominion power to regulate trade and commerce. If s. 5 and the other agency provisions are severed the Act could not be worked, and could not have been intended by the provincial legislature, which is the test. [On the question of severability reference was made to *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2); *Toronto Corporation* v. *York Corporation* (3); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (4).]

Gahan, for the Attorney-General for Canada, supported the argument for the appellants, and also put forward the following contentions:—(1.) Sect. 5 imposes a customs or import duty or attaches a condition to the admission of tobacco into the province. (2.) In so far as s. 5 imposes a duty on goods from other parts of Canada it is invalid by reason of the absolute prohibition in s. 121 of the Act of 1867. (3.) In so far as s. 5 imposes a duty on goods from abroad it is invalid because the parliament of Canada has exclusive legislative authority over customs duties on goods from abroad. (4.) If s. 5 is invalid the whole Act falls, because the effect of enforcing the other provisions of the Act without enforcing s. 5 would produce results which the legislature of New Brunswick would not desire and could not have contemplated: *Bank of Toronto* v. *Lambe* (5); *Gold Seal, Ld.* v. *Attorney-General for Alberta* (6); *City of Halifax* v. *Fairbanks' Estate* (7); *Citizens Insurance Company of Canada* v. *Parsons* (8); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (9); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (10); *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (11); and *Attorney-General for Manitoba* v. *Attorney-General for Canada* (12). (5.) Sect. 4 imposes a sales tax, which is an excise tax, and, therefore, the section is invalid because the parliament of Canada has exclusive legislative authority over excise: Halsbury's Laws of England, 2nd ed., vol. xxviii., pt. V., p. 330, note *(a)*; the

1943 A.C. p. 556.

(1) [1925] A. C. 561, 567.
(2) [1937] A. C. 355.
(3) [1938] A. C. 415, 426.
(4) [1937] A. C. 377, 387-388.
(5) 12 App. Cas. 575, 581.
(6) 62 S. C. R. (Can.) 424, 435, 456.
(7) [1928] A. C. 117, 124-125.
(8) (1881) 7 App. Cas. 96, 112.
(9) [1924] A. C. 222, 225.
(10) [1930] A. C. 357, 363-364.
(11) [1931] A. C. 310, 325.
(12) [1925] A. C. 561.

Kingcome case (1), which represents the limit to which the power of the province extends, and covers the whole of this proposition and also proposition (6.), which is *(a)* that ss. 4 and 5 impose taxation on a commodity and a transaction of sale and purchase, and *(b)* such a tax was recognized in and since 1867 as not being direct taxation. (7.) Sects. 4 and 5 tax an agent buying for another, and in that respect the tax is indirect: *Provincial Treasurer of Alberta* v. *Kerr* (2). (8.) The words taxing the agent cannot be severed because (i.) the remaining words would have to be rewritten to retain their present meaning, for mere striking out of the words affecting the agent's liability would change the construction of the remaining words, and (ii.) if the present meaning of the surviving words is retained, the Act is ineffective and the New Brunswick legislature cannot be presumed to have intended to pass it in its truncated form.

Tucker K.C. and *Frederick Grant* for the respondents. The pith and substance of the Act and the real nature of the tax must be ascertained. Its actual form is not conclusive: *Bank of Toronto* v. *Lambe* (3); *Rex* v. *Caledonian Collieries* (4); and *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (5). Although the tax here is in respect of, or relating to, a commodity, it is imposed on a person because he has acquired the commodity with a particular intention. It is really a tax on the intention with which he acquired it. To ascertain whether a tax is direct or indirect, it must be tested by Mill's formula, subject to the exception that where the tax falls within an established classification of taxation Mill's formula is not conclusive and the tax can be direct even though the burden of the tax can be passed on if desired. Such an established classification includes a tax imposed on a person in respect of real or personal property owned by him even though it is restricted to property used in a particular manner, and the tax will always be direct in such a case, provided that it is not property which the person liable to be taxed must be taken as intending to sell in the course of trade or otherwise deal in: *City of Halifax* v. *Fairbanks' Estate* (6). This tax falls within the established classification. Mill's

1943 A.C. p. 557.

(1) [1934] A. C. 45.
(2) [1933] A. C. 710, 717, 722.
(3) 12 App. Cas. 575, 583.
(4) [1928] A. C. 358, 362.
(5) [1940] A. C. 513, 528-529.
(6) [1928] A. C. 117, 120, 124 et seq.

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test of indirect taxation is referred to in *Bank of Toronto* v. *Lambe* (1), and it shows *(a)* that the nature of the tax must be such that it can be passed on, *(b)* that the passing on of the burden is one which is left by the legislature to the discretion of the taxpayer, that is, the legislature imposes a tax which can be passed on, but makes no condition: the *Kingcome* case (2), and (c) the test presupposes that the tax can only be so passed on by some independent transaction between the taxpayer and the person to whom it is to be passed on: *Cotton* v. *Regem* (3); *Burland* v. *The King; Alleyn* v. *Barthe* (4); and *Provincial Treasurer of Alberta* v. *Kerr* (5). This taxation is direct within the meaning of head (2.) of s. 92 of the British North America Act, 1867. The imposition and payment of the tax is not a part of the actual transaction of sale and purchase as between the vendor and purchaser, but is independent of it. The Act indicates with precision the person who is ultimately to bear the tax, and by its provisions ensures that, in all ordinary and normal circumstances, the burden of the tax will not and cannot be borne by, or passed on to, any other person. It is this general tendency of the tax which determines whether it is direct or indirect. [VISCOUNT SIMON L.C.: The Board are agreed that the main tax in s. 4 is, within Mill's definition, a direct tax. That leaves open the questions: *(a)* Is it in any sense excise? Even if it is, does this alter its validity as being direct? *(b)* Is the application of the tax to an agent authorized? *(c)* Is s. 5 ultra vires? *(d)* Severability? *(e)* Does either s. 121 or s. 122 of the British North America Act affect the matter?]

1943 A.C. p. 558.

Dealing first with the agency point, in every purchase through an agent, the principal, whether disclosed or undisclosed, is a party to the contract of purchase and sale, and such contract can be enforced by, or against, the principal. In every case the principal himself becomes a "consumer" under the first part of the definition of that word in s. 2 *(a)* of the Act, and thereupon himself becomes personally liable for the tax under s. 10. As regards importation into the province by an agent, the act of importation by the agent is the act of the principal, who thereupon becomes personally liable for the tax under the first part of s. 5. Where an agent

(1) 12 App. Cas. 575, 582.
(2) [1934] A. C. 45, 57.
(3) [1914] A. C. 176, 189.
(4) [1922] 1 A. C. 215, 223, 227.
(5) [1933] A. C. 710, 713 et seq.

is personally liable for any tax the principal is also directly liable for the same tax, and payment by either will discharge the liability of both. Where an agent pays the tax in such cases he must be deemed to have paid the money on behalf of and at the implied request of his principal, and his right to be recouped by his principal arises under the general law of agency and not out of some further and independent transaction between himself and the principal. In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) the Board apparently assumed that the tax there was direct on the principal, but that by charging the agent it was made indirect. That, however, is not this case, where the imposition of the tax on the agent is mere machinery for its collection from the principal. As regards s. 5, the payment of the tax is not a condition of admission of the tobacco into the province, but is charged only after it has been received by a person in the province, and it is not, therefore, invalid by reason of s. 121 of the British North America Act, 1867. If the tax charged under s. 5 is invalid, it is severable. Also, the Act does not offend against s.122 of the Act of 1867. That section does not of itself forbid the imposition of any new duty. At the most it only forbids the alteration of those customs and excise duties of each province which were in force in 1867. The expression "customs and excise" has the ordinary and normal meaning, and a customs duty should answer the following tests: (i.) it is a tax on a commodity which the legislature expects to form a subject of trade, for customs and excise are essentially trading taxes; (ii.) with regard to customs the payment is required before admission to the country; (iii.) customs duty is always imposed at a point in the economic chain other than the last link; (iv.) the legislature always intends that it should be passed on to somebody else solely at the volition of the person who pays it, or is indifferent whether it is passed on or not. Excise taxes have the same characteristics as customs duties except as to (ii.). This tax does not offend against the power of the Dominion under s. 91 (2.) to legislate for the regulation of trade and commerce. This Act was neither intended to, nor does it, regulate trade and commerce. Its pith and substance is to obtain revenue by imposing a tax on the acquisition of a particular article for a particular purpose: the *Kingcome* case (2). It is a tax placed on the last

1943 A.C. p. 559.

(1) [1925] A. C. 561.

(2) [1934] A. C. 45, 59.

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link of the financial chain. If it does regulate trade and commerce, then the provisions of s. 91 (2.) have to be read in a limited sense: *Shannon* v. *Lower Mainland Dairy Products Board* (1). In any event, if it regulates trade and commerce, it does so only within the province. The answer to the appellants' submission that it is not taxation "within the province" because consumption may take place anywhere, is that it is not a tax on consumption, but a tax on acquisition with a particular purpose. [Reference was made to *Forbes* v. *Attorney-General for Manitoba* (2).] Lastly, if s. 5 is bad as a whole, it is clearly severable, as also are any provisions of the Act which have been held objectionable as taxing an agent. *Attorney-General for Canada* v. *Attorney-General for Ontario* (3) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (4) are very different from the present case. The whole scheme of the present Act is not affected by the suggested severance, as it would have been in the above cases. The decision of the Supreme Court was right except on the question of agency.

Sir Walter Monckton K.C. and *Devlin* for the Attorney-General for Quebec. To ascertain its pith and substance the Act must be scrutinized in its entirety: *Attorney-General for Ontario* v. *Reciprocal Insurers* (5). This Act falls within s. 92 (2.) of the British North America Act. It hits the persons intended to be hit, and is a direct tax on the consumer, and whether it is payable before or after consumption in immaterial. Every possible precaution is taken by the Act to prevent the tax being passed on to others, and it is difficult, if not impossible, to do so, and that alone is a true test of the distinction between a direct and indirect tax. Exceptional cases where the person who has paid the tax may be able to pass it on are irrelevant. With regard to s. 121 of the British North America Act, the tax here is not imposed in respect of the admission of a commodity into the province, but on the purchase of it for consumption. As to the agency provision in s. 4 (read in conjunction with s. 2 (*a*)), it is only to ensure that the tax is paid that liability is put on the agent. It is not a question of shifting the burden of taxation. Making the agent, who will never be more than a messenger and who practically always is provided in advance with the money,

1943 A.C. p. 560.

(1) [1938] A. C. 708, 718.
(2) [1937] A. C. 260, 272.
(3) [1937] A. C. 355.
(4) [1937] A. C. 377.
(5) [1924] A. C. 328, 337.

liable for the tax does not make it an indirect one, even where the messenger advances the funds to pay the tax. In any event, this provision is severable. Sect. 5 of the Act does not levy a customs duty, nor is it imposed in connexion with the importation of tobacco in the province, but it is levied from the consumer once he is in possession for purposes of consumption. This case is very different from *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) where there was the extensive use of brokers, factors, etc. [Reference was also made to *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (2).]

F. W. Wallace for the Attorneys-General for Manitoba and Saskatchewan, *Tucker K.C.* and *Frederick Grant* for the Attorney-General for Prince Edward Island, *Devlin* for the Attorney-General for Ontario, and *Kyffin* for the Attorney-General for Nova Scotia all adopted the argument for the respondents.

Pritt K.C. replied.

July 30. The judgment of their Lordships was delivered by VISCOUNT SIMON L.C. This appeal from a judgment of the Supreme Court of Canada raises the important and difficult question whether the Tobacco Tax Act of New Brunswick, 1940 (4 Geo. 6, c. 44), and the regulations made thereunder are within the powers of the provincial legislature as constituting "direct taxation within the province," or whether, on the contrary, all or any part of these provisions must be held to be ultra vires having regard to the distribution of legislative powers effected by the British North America Act, 1867, and to the bearing of ss. 121 and 122 of the Act on provincial taxing powers.

1943 A.C. p. 561.

The New Brunswick Tobacco Tax Act is entitled "An Act "to provide for imposing a tax on the consumption of tobacco." [His Lordship referred to ss. 2 to 10 of the Act and continued:] There are thus four applications of the tax provided for by ss. 4 and 5: *(a)* In its main and simplest form the tax is to be paid by anyone who purchases tobacco, as defined, for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province. The tax amounts to ten per cent. on the retail

(1) [1925] A. C. 561, 566. (2) [1898] A. C. 700, 713.

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price charged on the sale. By regulations made under s. 20 of the Act it is to be collected by the retail vendor, who is constituted an agent of the minister for the collection of the tax, and has to give a receipt for the tax to the customer and account to the Tobacco Tax Commissioner for the tax thus collected, subject to the allowance of three per cent. as remuneration. *(b)* If the purchase from the retail vendor is made by an agent acting for a principal, who desires to acquire such tobacco for his own consumption (or for the consumption of other persons at his expense), the tax is payable by the agent. It is, however, clear that if the agent has not already been put in funds by his principal, he will be entitled to be indemnified by his principal for the tax, no less than for the purchase price. In both cases *((a)* and *(b))* the tax is payable at the time of making the purchase. *(c)* If a person residing or ordinarily resident or carrying on business in New Brunswick brings into the province such tobacco, or receives delivery of it in the province, for his own consumption (or for the consumption of other persons at his expense), he is to report the matter to the minister, with any invoice and other information required, and he becomes liable to pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the province. *(d)* Lastly, if such a person as is last described brings the tobacco into the province, or receives delivery there, as agent for a principal who desires to acquire it for his own consumption (or for the consumption of other persons at his expense), the agent is put under a similar obligation to report and to pay an equivalent tax. It may be noted that in this last case the principal is not in express terms limited to a principal within the province. This is perhaps implied, but, in any event, the instance of an agent within the province acting for a principal outside can seldom occur.

1943 A.C. p. 562.

A striking difference of opinion has disclosed itself in the Canadian courts as to the validity of this taxing legislation. In the Supreme Court of New Brunswick, Baxter C.J. and his two colleagues, Grimmer and Richards JJ., held that the tax was valid. Applying the definition of a direct tax which was used by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), and which is derived from John Stuart Mill's "Principles of "Political Economy" (bk. V. c. 3) as "one which is demanded

(1) 12 App. Cas. 575, 582.

"from the very persons who it is intended or desired should "pay it," they held that the tax in all its forms was a direct tax and within the power of the provincial legislature to impose. On appeal to the Supreme Court of Canada, conflicting views were expressed, and these need to be carefully analysed. On the first and main form of the tax Duff C.J. and Davis J. held that the tax was not direct. The Chief Justice considered that the tax was a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser. He says that "the payment of the tax "is not only a condition of legal purchase; it is an integral "element in the transaction of sale and purchase passing "from the purchaser to the vendor as part of the price to "the purchaser" (1). In effect, the argument is that this is a sales tax and that, being a sales tax, it is necessarily indirect. Rinfret J. and Crocket J. maintained the opposite view, and agreed with the judgment of the Supreme Court of New Brunswick that the tax in all its forms was intra vires. Kerwin J. took up an intermediate position. He considered that the tax in the form *(a)* was valid, but that the attempt to impose the tax on an agent failed as being indirect taxation. He further held that the tax in the forms *(c)* and *(d)* was also invalid as being an infringement of s. 121 of the British North America Act. Hudson J. held that the tax was valid, save so far as it imposed a liability on an agent, i.e., that *(a)* and *(c)* were valid, but that *(b)* and *(d)* were not, and Taschereau J. took the same view. In the result, therefore, the majority of the Supreme Court of Canada decided that the tax in the forms *(a)* and *(c)* was valid, but that it was invalid in the forms *(b)* and *(d)*, since these latter forms involved taxation of an agent, whereas the burden of the taxation would fall on his principal. The arguments addressed to the Board, which included arguments on behalf of the Attorney-General for Canada, supporting the appellants, and of other interveners representing Quebec and five other provinces supporting the respondents, ranged over all aspects of the tax, and their lordships are requested to reach a conclusion as to the validity or non-validity of the tax in all its forms.

1943 A.C. p. 563.

Their Lordships must first consider whether the tax in the form *(a)* is a valid exercise of provincial legislative powers. It has been long and firmly established that, in interpreting

(1) [1941] S.C.R. (Can.) 679.

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the phrase "direct taxation" in head 2 of s. 92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as Lord Herchell said in *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1), is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's Political Economy was first published in 1848, and appeared in a popular edition in 1865. Its author became a member of parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified. In addition to the definition from Mill's Political Economy already quoted, citation may be made of two other passages as follows: "Direct taxes are either "on income or on expenditure. Most taxes on expenditure "are indirect, but some are direct, being imposed not on the "producer or seller of an article, but immediately on the "consumer" (bk. V. ch. 3). And again, in ch. 6, in discussing the comparative merits of the two types of tax, he takes as the essential feature of direct taxation that "under it every-"one knows how much he really pays." Their Lordships, therefore, consider that this tobacco tax in the form they have called *(a)* would fall within the conception of a "direct" tax, and ought so to be treated in applying the British North America Act. It is a tax which is to be paid by the last purchaser of the article, and, since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and farfetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be con-

1943 A.C. p. 564.

(1) [1897] A.C. 231, 236.

sidered. So regarded, it completely satisfies Mill's test for direct taxation. Indeed, the present instance is a clearer case of direct taxation than the tax on the consumer of fuel oil in *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (1), for fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct. In the case of tobacco, on the other hand, the consumer produces nothing but smoke. Mr. Pritt argued that the tax is a sales tax, and that a sales tax is indirect because it can be passed on. The ordinary forms of sales taxes are, undoubtedly, of this character, but it would be more accurate to say that a sales tax is indirect when in the normal course it can be passed on. If a tax is so devised that (as Mill expresses it) the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a "peculiar "contribution" on the particular party selected to pay the tax, such a tax is not proved to be indirect by calling it a sales tax. Previous observations by this Board as to the general character of sales taxes, or of taxes on commercial dealings, ought not to be understood as denying the possibility of this exception.

There remains, on this first head, the question whether, notwithstanding that the tax in the form *(a)* is "direct" within Mill's test, it is none the less beyond the powers of the province to impose as being in the nature of "excise" in the sense that the attempted imposition would be an alteration of the "excise laws" of New Brunswick which the provincial legislature is debarred from affecting under s. 122 of the British North America Act. "Excise" is a word of vague and somewhat ambiguous meaning. Dr. Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of the word is that many miscellaneous taxes, at any rate in this country, are classed as

1943 A.C. p. 565.

(1) [1934] A.C. 45.

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"excise" merely because they are for convenience collected through the machinery of the Board of Excise—the tax on owning a dog, for example. Their Lordships do not find it necessary in the present case to determine whether this tobacco tax in the form *(a)* is for any purpose analogous to an excise duty, for it is enough to accept and apply the proposition laid down on behalf of this Board by Lord Thankerton in the *Kingcome* case, namely, "that if the tax "is demanded from the very persons who it is intended or "desired should pay it, the taxation is direct, and that it "is none the less direct, even if it might be described as an "excise tax" (1). In the course of reaching this conclusion, Lord Thankerton carefully examined the only two cases which might be thought to contain any suggestion to the contrary effect, namely, *City of Halifax* v. *Fairbanks' Estate* (2) and *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (3), and pointed out that the customs or excise duties on commodities ordinarily regarded as indirect taxation referred to in the judgments in these two cases are duties which are imposed in respect of commercial dealings in commodities in such a form that they would necessarily fall within Mill's definition of indirect taxes. Their Lordships are of opinion that Lord Cave's reference in his judgment in the *Fairbanks'* case to "two "separate and distinct categories" of taxes, "namely, those "that are direct and those which cannot be so described" (4), should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article. With the greatest respect to the view of the Chief Justice of Canada, their Lordships are unable to take the view that a valid distinction is to be found between the directness of the tax in the *Kingcome* case (1) and the quality of the tax in the present instance on the ground that in the former case the tax was on every person who had consumed fuel oil whereas the tax in the present case is on every person who buys tobacco in order to consume it. In both instances the circumstance which makes the tax direct is the same, namely, that the person who pays the tax is the person who

1943 A.C. p. 566.

(1) [1934] A.C. 45, 55.
(2) [1928] A.C. 117.
(3) [1930] A.C. 357.
(4) [1928] A.C. 124.

actually bears it, and this arises necessarily from the circumstance that purchase for re-sale is not taxed. Their Lordships, therefore, conclude that the tax in form *(a)* is valid.

Next comes the question whether the tax, though "direct" when the principal deals personally with the retail vendor across the counter, ceases to be "direct" if the purchase is made by an agent acting for his principal. Their Lordships have already pointed out that in this case also the person who bears the tax is really the principal, either because he has already given his agent the money to pay it or because he is bound forthwith to repay his agent for the expense incurred with his authority and on his behalf. This indemnification does not follow because there is any fresh transaction analogous to re-sale after the purchase by the agent has been made. It is part and parcel of a single transaction. The agent pays the tax for and on behalf of his principal. If, indeed, the agent gave the name of his principal to the vendor the contract of sale would be with the principal. If there was anything to complain of in the quality of the article it would be the principal, whether named or not, who might have a remedy against the vendor. It is said that the tax in this second form is not direct because the agent, who is personally liable for the tax and has to pay it when receiving the tobacco, is distinct from the principal who bears the burden of the duty, but, in their Lordships' opinion, this circumstance does not, according to the distinction laid down by Mill, prevent the tax from being a direct tax. There is an obvious distinction between an indirect tax, like an ordinary customs or excise duty, which enters into the cost of an article at each stage of its subsequent handling or manufacture, and an impost laid on the final consumer, as "the particular party selected to pay "the tax," who produces the money which his agent pays over. This is mere machinery, and resembles the requirement in British income tax that in certain cases A is assessed for tax which B really bears—a circumstance which does not make income tax "indirect." The test for indirect taxation which Mill prescribed is the passing on of the burden of a duty by the person who first pays it through subsequent transactions to future recipients in the process of dealing with the commodity, or, at any rate, the tendency so to pass on the burden. Here the position is quite different.

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It is really the principal who in this case also both pays the tax and bears it. Their Lordships find it impossible to suppose that, in applying the economic distinction which is at the bottom of Mill's contrast, it would be correct to call this tax "direct" if a man bought a packet of cigarettes over the counter by putting his hand in his pocket and paying price and tax himself to the vendor, but "indirect" if he stood outside the shop and gave his wife the necessary amount to get the cigarettes and pay the tax for him. It is argued that the decision of this Board in the *Grain Futures* case, *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), goes to show that a tax imposed on agents dealing in a commercial article for their principals must be indirect. Their Lordships are of opinion that the actual decision does not justify so wide and general a deduction. The tax in the *Grain Futures* case (1), as Lord Haldane pointed out, became a charge against the amount of the price which was to come to the seller in the world market, and was thus indirect. Similar considerations governed the view taken by this Board in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (2); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (3); and *Rex* v. *Caledonian Collieries* (4). In all these instances the tax was indirect because of its tendency to affect the price paid by persons other than the taxpayer for the commodity as an article of trade. Nothing of the sort happens here. The production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco. Notwithstanding that an agent is employed, it is the principal who really finds the money for the tax and he throughout bears the burden of it. Qui facit per alium facit per se. Their Lordships, therefore, take the view that the tax imposed by s. 4 of the Act is valid both in the form (*a*) and in the form (*b*).

For the same reasons, and apart from other considerations which apply only to s. 5, their Lordships are of opinion that the tax is valid in the forms (*c*) and (*d*), but the tax imposed by s. 5 raises difficulties of a different order. It is manifest that s. 5 is enacted merely as a supplementary provision, to guard against the methods of avoidance of s. 4 which

1943 A.C. p. 568.

(1) [1925] A.C. 561.
(2) [1933] A.C. 168.
(3) [1927] A.C. 934.
(4) [1928] A.C. 358.

might otherwise remain available. At the same time, the validity of s. 5 must be judged according to its terms, and, if its enactment by the provincial legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme watertight. Objection is taken to the validity of s. 5 on the alleged ground that it offends against ss. 121 and 122 of the British North America Act. When the scheme of Canadian federation is considered as a whole, the purpose and effect of these two sections seem plain enough. Previous to the date of federation, each province was a separate unit raising part of its revenue by customs duties on certain commodities imported from outside—it might even be from another province. One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence s. 121, supplemented by s. 123, established internal free trade from July 1, 1867, which was the date proclaimed for the Union. It was not, however, practicable to abolish provincial customs entirely on that date. Ordinary customs and excise are, as Mill's treatise shows, the classical examples of indirect taxation, and thus fell thenceforward within the exclusive legislative competence of the dominion parliament. But until the Dominion had imposed and collected sufficient taxes on its own account, it was desirable to continue to gather in the revenue arising from the customs and excise laws of the provinces (with the exception of inter-provincial import duties), though it would appear from s. 102 of the British North America Act that after federation the proceeds passed into the consolidated revenue fund of the Dominion. A dominion tariff has long since been enacted and the customs and excise laws of the different provinces have been brought to an end by dominion legislation. The question, therefore, on this part of the case, which has to be determined is whether s. 5 of the New Brunswick Act is invalid as amounting to an attempt by the province to tax in disregard of the restrictions contained in ss. 121 and 122 of the constitution. If s. 5 purports to impose a duty of customs, it is wholly invalid, and, if it denies free admission of tobacco into New Brunswick, it is invalid so far as this refers to tobacco manufactured in another province of Canada. Their Lordships have reached the conclusion that s. 5 does not impose a customs duty, and they adopt the reasoning on this point of Rinfret J.

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and Crocket J. The argument to the contrary is the argument that failed in the *Kingcome* case (1). Lord Thankerton pointed out the distinction in his judgment in that case when he said: "Customs and excise duties are, "in their essence, trading taxes, and may be said to be more "concerned with the commodity in respect of which the "taxation is imposed than with the particular person from "whom the tax is exacted" (2). Here the tax is not imposed on the commodity as such at all, and is not imposed on anyone as a condition of its lawful receipt. The "particular "person" from whom the tax is exacted is the recipient in the province only if he is the prospective smoker, and, as Lord Hobhouse said in *Bank of Toronto* v. *Lambe* (3), "any "person found within the province may legally be taxed "there if taxed directly." Their Lordships agree with the majority of the Supreme Court that this is not a duty of customs.

Similar considerations dispose of the contention that, as applied to the recipient of tobacco manufactured in another province, the tax offends s. 121. Here again, it is important to remember the special feature of the tax that it is imposed as a direct tax on the consumer. Sect. 121 was the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal, Ld.* v. *Attorney-General for Alberta* (4), where the question arose whether the parliament of Canada could validly prohibit the importation of intoxicating liquor into those provinces where its sale for beverage purposes was forbidden by provincial law. The meaning of s. 121 cannot vary according as it is applied to dominion or to provincial legislation, and their Lordships agree with the interpretation put on the section in the *Gold Seal* case (4). Duff J. held that "the phraseology adopted, when "the contest is considered in which the section is found, "shows, I think, that the real object of the clause is to "prohibit the establishment of customs duties affecting "inter-provincial trade in the products of any province of "the union" (5). Anglin J. said: "The purpose of that "section is to insure that articles of the growth, produce "or manufacture of any province shall not be subjected

(1) [1934] A.C. 45.
(2) Ibid. 59. (A.C.)
(3) 12 App. Cas. 575, 584.
(4) (1921) 62 S.C.R. (Can.) 424, 439.
(5) Ibid. 456. (A.C.)

"to any customs duty when carried into any other province" (1). Mignault J. described the purpose of the section as being to secure that admission of the articles described should be "without any tax or duty imposed as a condition "of their admission" (2). These considerations make it clear that if s. 5 of the Tobacco Tax Act is not obnoxious to s. 122 of the British North America Act, it is also free from objection on the score of s. 121. That the tax is taxation within the province is, their Lordships think, clear for the reasons given by Taschereau J.

Their Lordships will humbly advise His Majesty that the appeal fails and that the Tobacco Tax Act, 1940, is in all respects a valid exercise of the powers of the legislature of the province of New Brunswick. The order of the Supreme Court must, therefore, be varied by omitting the words "with the exception of the provisions thereof making the "agent liable for the tax." The appellants must pay the respondents' costs of the appeal. The interveners will, of course, bear their own costs.

Solicitor for appellants: *Duncan Morris Oppenheim.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for respondents and for Attorneys-General for Ontario, Manitoba, Saskatchewan, and Prince Edward Island: *Blake & Redden.*

Solicitors for Attorney-General for Quebec: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Nova Scotia: *Burchells.*

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(1) (1921) 62 S.C.R. (Can.) 466. (2) Ibid. 470. (A.C.)

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1946
Jan. 21.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS ..... APPELLANTS;

AND

CANADA TEMPERANCE FEDERATION AND OTHERS ..... RESPONDENTS.

1946 A.C. p. 193.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada—Ontario—Dominion Temperance Act—Re-enactment of previous materially identical legislation—Constitutional validity—Relative to the "peace, and good government of Canada"—Binding authority—Canada Temperance Act, R.S.C., 1927, c. 196, Pts. I., II. and III.—British North America Act, 1867 (30 & 31 *Vict., c.* 3), *ss.* 91, 92.

Russell v. *The Queen* (1882) 7 App. Cas. 829, by which the Canada Temperance Act, 1878, was held to be within the legislative competence of the Dominion Parliament under s. 91 of the British North America Act, 1867, on the ground that it related to the peace, order and good government of Canada, and did not deal with any of the matters exclusively reserved to the provinces by s. 92 of the Act of 1867, was rightly decided, and must be regarded as firmly embedded in the constitutional law of Canada, and it follows that Part I., II. and III. of the Canada Temperance Act, R.S.C., 1927, c. 196, which replaced the Act of 1878 and consolidated therewith the various amending Acts that had from time to time been enacted, and the material provisions of which were identical with those of the Act of 1878, were equally valid Dominion legislation.

The British North America Act, 1867, nowhere gives power to the Dominion Parliament to legislate in matters which are properly within the competence of the Provincial Legislatures merely because of the existence of an emergency. An emergency may be the occasion which calls for legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not. The true test must be found in the real subject-matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be a concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the Provincial Legislatures.

1946 A.C. p. 194.

To legislate for prevention appears to be on the same basis as legislation for cure, and if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to have necessitated the earlier statute.

Judgment of the Court of Appeal for Ontario [1939] O.R. 570, affirmed.

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* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD ROCHE, LORD GREENE and LORD GODDARD.

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ATTORNEY-GENERAL FOR ONTARIO v. CANADA TEMPERANCE FEDERATION.

APPEAL (No. 2 of 1940) from a judgment of the Court of Appeal for Ontario (September 26, 1939) on a reference by the Lieutenant-Governor in Council for hearing and consideration of the following question: "Are Parts I., II. and III. of The "Canada Temperance Act, R.S.C., 1927, c. 196, "constitutionally valid in whole or in part, and if in part, "in what respect?" Part II. of the Act prohibited the sale of intoxicating liquor in any county or city in the Dominion from the time such Part was brought into force therein. Part I. provided the procedure, by a system of local option on a majority vote, for bringing it into force. Part III. provided penalties for breaches of the Act.

A majority of the judges of the Court of Appeal (Riddell, Fisher, McTague and Gillanders JJ.A.) answered the question in the affirmative, considering themselves bound so to answer by the decision in *Russell* v. *The Queen* (1). Henderson J.A., dissenting, answered the question in the negative.

1945. Dec. 3, 4, 5, 6, 10. *Sir Cyril Radcliffe K.C.* and *C. R. Magone K.C.* (of the Canadian Bar) for the appellant the Attorney-General for Ontario. The Canada Temperance Act, R.S.C., 1927, so far as Parts I., II. and III. go, is in substantially the same form as the original Canada Temperance Act of 1878, the preamble of which—not included in subsequent consolidations—is strong evidence as to what the circumstances were at the time of the original Act, and much of this case turns on the circumstances which are said to have given the Dominion power to pass this particular legislation. The effect of the Act in question was to produce legislation affecting either "civil rights and "property within the Province," a subject-matter within the exclusive legislative competency of the Province under head 13 of s. 92 of the British North America Act, 1867, or "matters merely local and private within the Province," and so within exclusive Provincial competence under head 16 of s. 92 of the Act of 1867. It is local in this case because the whole issue before the elector in the county or city is the local question whether within his area persons dealing or trafficking in alcohol should come under the restriction of the prohibition. As to property and civil rights, prima facie, at any rate, it is legislation in relation to these two

1946 A.C. p. 195.

(1) (1882) 7 App. Cas. 829.

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classes of matters. A further question is whether, if it can be said to be legislation in relation to heads 13 and 16 of the Constitution Act, it can be right to say that the general residuary power of the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to subjects not covered by s. 92 can justify this particular Act. This Board has held that there are cases when the circumstances are so extreme, and the emergency so great, that although the matter would otherwise come within one of the heads of s. 92, it passes out of that in the circumstances of emergency and falls within the necessary power of the central legislature under peace, order and good government to save the life of the nation—the words have been as strong as that. There were not the circumstances existing in 1924-5, when the Temperance Act was last revised, which could give the Parliament of Canada authority to treat this subject-matter as an emergency and legislate accordingly. The time has come, it is submitted, for the Board to review *Russell* v. *The Queen* (1), by which the Canada Temperance Act, 1878, was held valid, and declare it not to be a good decision; it has been losing strength. [The whole judgment in *Russell* v. *The Queen* (1) was read, and reference was also made to *Hodge* v. *The Queen* (2), *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (3), and *Att.-Gen. for Manitoba* v. *Manitoba Licence Holders' Association* (4).] It was said in the last cited case that the result of the decisions was remarkable, with *Russell* v. *The Queen* (1) on one side and *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (3) on the other. Reliance is placed on the last case (3) for the view that legislation providing for local option about prohibition in a provincial sub-division is in its true meaning legislation either in relation to civil rights and property or matters merely local and private to the province within the meaning of s. 92. If the Board had not taken that view in that case there would have been no place for the validity of the Ontario local prohibition Act. If that is the case, how can a Dominion statute which provides for nothing different except local option for the prohibition of liquor traffic in a subdivision of the province avoid being legislation in respect of either head 13 or 16 of s. 92, even though the provision be conceived by the Dominion

1946 A.C. p. 196.

(1) 7 App. Cas. 829.
(2) (1883) 9 App. Cas. 117.
(3) [1896] A.C. 348.
(4) [1902] A.C. 73.

as one for the general advantage of Canada as a whole, or for the securing of uniform legislation throughout the Dominion, and therefore referred to peace, order and good government, because the Dominion power to legislate for peace, order and good government is subject to the exception of matters which come within the sub-heads of s. 92.

Next, there are three cases in which it was argued, founding on *Russell* v. *The Queen* (1), that the Dominion Acts there in question, although they trenched on civil rights and property within the Province, were within the Dominion power to legislate for peace, order and good government because they affected the affairs of the Dominion as a whole. The Acts were held invalid, and the three cases show how extreme that general power under s. 91 must be not to be affected by the exclusion of the sixteen sub-heads of s. 92: *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* (2); *In re Board of Commerce* (3), and *Toronto Electric Commissioners* v. *Snider* (4). It was said in the last case that "Their Lord-"ships find it difficult to explain the decision in *Russell* v. "*The Queen* (1) as more than a decision of this order upon "facts, considered to have been established at its date "rather than upon general law" (5); and it was said: "Their Lordships think that the decision in *Russell* v. "*The Queen* (1) can only be supported to-day, not on the "footing of having laid down an interpretation, such as "has sometime been invoked of the general words at the "beginning of s. 91, but on the assumption of the Board, "apparently made at the time of deciding the case of *Russell* "v. *The Queen* (1), that the evil of intemperance at that time "amounted in Canada to one so great and so general that at "least for the period it was a menace to the national life of "Canada so serious and pressing that the National Parlia-"ment was called on to intervene to protect the nation from "disaster" (6). That is a very important judgment; it is sometimes said that what was there said with regard to *Russell* v. *The Queen* (1) was obiter, but that is not an adequate description of the Board's observations. Looking at the Dominion Acts dealt with in the above three cases there is on the face of all of them no less an apparent

1946 A.C. p. 197.

(1) 7 App. Cas. 829.
(2) [1916] 1 A.C. 588.
(3) (1920) 60 S.C.R. (Can.) 456, 506-12; [1922] 1 A.C. 191, 196.
(4) [1925] A.C.396.
(5) Ibid. 413. (A.C.)
(6) Ibid. 412. (A.C.)

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intention on the part of the Dominion to make a general law for Canada as a whole than the present local option Act can show; it is difficult to say that there was any situation less grave for the Dominion than is found in the Canada Temperance Act, and yet the Board said that in all those cases the Acts were not within the Dominion power. [Reference was also made to *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press Co.* (1).] There are also passages in three cases which, it is submitted, have treated as beyond question to-day this doctrine of the necessary limitation of the Dominion power to legislate successfully under peace, order and good government when the subject-matter of the legislation is capable of being regarded in another aspect as being within the provincial powers: *In re The Regulation and Control of Aeronautics in Canada* (2); *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario* (3); and *In re The National Products Marketing Act, 1934, and its Amending Act, 1935* (4), which last has been commended by the Board as the locus classicus, and is of peculiar importance to this argument, for Duff C.J. disclaims the idea that the fact that a problem is of national importance is sufficient to bring it within the general powers of s. 91, and he stresses how exceptional the circumstances must be. It is submitted that if the Board who decided *Russell* v. *The Queen* (5) in 1882 had read that judgment of the Supreme Court they would not have felt at liberty to decide it in the way they did. The constitutional doctrine has grown. There are two cases, quite simply, where the Dominion can claim its power to legislate under peace, order and good government, first, where the subject-matter of the legislation is inherently something which is outside the actual provisions of ss. 91 and 92 of the British North America Act; and secondly, in the case of a new aspect of existing affairs in the Dominion, of which Lord Haldane spoke in giving the judgment of the Board in the *Fort Frances* case (1).

The authority under which the Act of 1927 exists to-day is the 1924 revision (14 & 15 Geo. 5, c. 65). Whether the exercise of that authority takes the form of revision or consolidation it was just as much a fresh plan by the Dominion Parliament at that time to make a law by repeal-

(1) [1923] A.C. 695, 701.
(2) [1932] A.C. 54, 71-2.
(3) [1937] A.C. 326, 352-3.
(4) [1936] S.C.R. (Can.) 398, 416-26.
(5) 7 App. Cas. 829.

ing the pre-existing Act and putting a new Act in its place. Therefore, in the rare cases where the power of the Dominion rests on a claim that exceptional circumstances exist to justify its right to legislate, those circumstances must also exist at the time when the claim to make the new legislative provision is in fact made: *Snider's* case (1). It is submitted that the emergency, if it ever existed, was no longer there in 1927, and as all the provinces of Canada have passed legislation either controlling or prohibiting the sale of intoxicating liquor, a national emergency cannot be assumed to exist in relation to the traffic in intoxicating liquor. The provincial legislation shows a very different change of scene from anything that could have been contemplated by the makers of the Act of 1878. This branch of the argument assumes, of course, that the Act was originally validly enacted and that *Russell* v. *The Queen* (2) should be regarded as good law to-day. This is an occasion, however, when the Board should not shrink from reversing that decision if necessary: *Read* v. *Bishop of Lincoln* (3). Lastly, an emergency Act passed by the Dominion Parliament which infringed provincial rights would not be a valid Act at any time if it purported to be permanent Act. The Act in question does so purport. "Emergency" means temporary for this purpose.

Barton K.C. and *Bethune L. Smith* for the appellant, the Moderation League of Ontario, adopted the argument for the Attorney-General for Ontario, and on the jurisdiction of the Board to reverse a previous decision of the Board referred to *In re Transferred Civil Servants (Ireland) Compensation* (4). The main aspect of this case is the validity of *Russell's* case (2); primarily, the basis of the decision in that case is that the subject-matter of the Act of 1878 was not within any of the enumerated heads of s. 92—the concluding words of the judgment show that—and it is submitted that to that extent *Russell's* case is wrong: *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (5). [Relevant passages in the authorities were reviewed.] Traffic in the sale of liquor in a province as a subject-matter of legislation is exclusively within provincial jurisdiction, and in each of the provinces in Canada there is now either

(1) [1925] A.C. 396.
(2) 7 App. Cas. 829.
(3) [1892] A.C. 644, 654.
(4) [1929] A.C. 242, 252.
(5) [1896] A.C. 348.

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total prohibition or government control whereby the traffic is regulated suitably to the needs of the province. When emergency legislation is brought into question it must be shown affirmatively that the emergency continues.

C. R. Magone K.C. (of the Canadian Bar) for the Attorneys-General for Alberta and New Brunswick, interveners. I am asked to say that the provinces of Nova Scotia and Saskatchewan support this argument. I adopt the argument for the Attorney-General for Ontario. The reason given in *Russell's* case (1) that the legislation there was meant to apply to an evil which was assumed to exist throughout the Dominion was not entirely accurate, because at that date the Act did not apply throughout the Dominion, and it is submitted that the Board would have come to a different conclusion had they been informed of what the position was under the Canada Temperance Act. From the note to *Molson* v. *Lambe* (2) it can only be assumed that the Board at that time had come to the conclusion that there was some doubt about *Russell's* case (1). If the preamble to the Act of 1878 had appeared in the 1927 revision it would not have been an accurate description of that Act because of the changes that had been made. Assuming that there was originally an emergency, at some time between 1878 and 1927 it had completely disappeared, or the conditions had changed to such an extent, either geographically or otherwise, that when the Dominion legislated again on the same subject it should have made a declaration that it was legislating in an emergency if it desired to pass a new Canada Temperance Act. In the absence of some evidence that there was an emergency the Act that was passed was ultra vires because it was in relation to a matter in a class of subject which is enumerated in s. 92.

Geoffrion K.C. (of the Canadian Bar) for the respondent the Attorney-General for Canada. The rule of stare decisis should be applied, and in that respect, apart from the judgments that have been read, there are a number of others where *Russell* v. *The Queen* (1) has been cited as a subsisting authority supporting some proposition: *Att.-Gen. for Ontario* v. *Reciprocal Insurers* (3); *Gallagher* v.

(1) 7 App. Cas. 829.
(2) (1888) 4 Cartwright's cases on the B.N.A. Act, 1867, at p. 342.
(3) [1924] A.C. 328, 338.

Lynn (1); *Shannon* v. *Lower Mainland Dairy Products Board* (2); *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* (3) and *King-Emperor* v. *Benoari Lal Sarma* (4). The whole argument for the appellants that *Russell's* case (5) was wrongly decided is based on inferences drawn from certain judgments, but an extraordinary feature is that the judgments from which they draw them say that it was rightly decided. It is not a question of overruling *Russell's* case (5), but of reversing it, and if that is to be done the whole matter should be reopened. There is the same controversy about "trade and commerce" and so on; in other words, the slate must be wiped clean and a start made again to rebuild a new jurisdiction on the constitution. [Reference was made to *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (6), *Att.-Gen. for Manitoba* v. *Manitoba Licence Holders' Association* (7) and *In re The Regulation and Control of Aeronautics in Canada* (8).] If the emergency question has to be dealt with, the idea that any emergency has disappeared is challenged; two judges below expressly say that the circumstances have not changed, and there is no evidence that they have. There is a heavy burden on the appellants to show that the power in 1927, if it was exercised then, had become unjustifiable by a change of circumstances subsequent to the earlier Act. On the analogy of *In re The Initiative and Referendum Act* (9) there is a big difficulty in claiming this to be a new law. The judgment of the Board in *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (6) settles the point that it is not new legislation, for the re-enactment in 1886 was in 1896 held to be governed by *Russell's* case (5), and the provisions are the same here. Some heading must be found to justify the Act, and if the Board think that "peace, order and good government" should be eliminated—this respondent is satisfied with that heading—"criminal law" and "trade and commerce" are suggested as possible alternative headings. If the door is opened, it should be opened wide and the matter investigated. "Peace, order and good government" is preferred because it is logical that a long line of decisions should not be reversed. The heads of "criminal law" and "trade and

(1) [1937] A.C. 863, 870.
(2) [1938] A.C. 708, 719-20.
(3) [1939] A.C. 117, 129.
(4) [1945] A.C. 14, 24.
(5) 7 App. Cas. 829.
(6) [1896] A.C. 348, 356.
(7) [1902] A.C. 73.
(8) [1932] A.C. 54, 71-2.
(9) [1919] A.C. 935.

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"commerce" have recently been widened by the Board in *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* (1) and *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada* (2). Lastly, it is submitted that the Act does not depend on temporary conditions, but if it does, the burden is on the appellants to show that they no longer exist.

A. T. Whitehead (of the Canadian Bar) for various Temperance Federations. I adopt the argument for the Attorney-General for Canada, and submit that the principle of stare decisis as found in four of the judgments below in this case should be applied, and that *Russell's* case (3), which has never been reversed or overruled, and has stood since 1882, should be held to have been properly decided. [In support of that contention reference was made to a number of the cases cited above, including *Shannon* v. *Lower Mainland Dairy Products Board* (4), *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* (5) and *King-Emperor* v. *Benoari Lal Sarma* (6).] Further, there are many cases in Canada in which prosecutions have taken place and fines have been paid in respect of breaches of the Canada Temperance Act. That Act in its true aspect was intra vires the Dominion Parliament; the tests set out in the line of cases and finalized in the judgment of Duff C.J. in the *National Products Marketing Act* case (7) should be accepted, and the dictum in the *Fort Frances* case (8) should be adopted—that the Dominion Parliament, which represents the people as a whole, must be deemed to be left with considerable freedom of judgment. Lastly, the question is not merely academic, but is of vital practical moment to large groups of people in Canada. [Reference was made to *Reference re Operation of Canada Temperance Act in Counties of Perth, Huron and Peel in Province of Ontario* (9).]

Sir Cyril Radcliffe K.C. replied. It is said for the Attorney-General for Canada that the whole of the argument for the appellants relies on inferences drawn from cases which had themselves accepted *Russell's* case (3). That general statement cannot be accepted without asking what was the nature of the acceptance in each case; there are accept-

(1) [1937] A.C. 368.
(2) [1931] A.C. 310, 326.
(3) 7 App. Cas. 829.
(4) [1938] A.C. 708.
(5) [1939] A.C. 117.
(6) [1945] A.C. 14.
(7) [1936] S.C.R. (Can.) 398.
(8) [1923] A.C. 695.
(9) [1935] S.C.R. (Can.) 494.

ances which admit of welcome, others which admit of recognition, and some which are no more than a rather quizzical toleration. It is impossible to read the references made by this Board to *Russell's* case (1) without seeing how very guarded the language of the acceptance is in each case. [Reference was made to extracts from a number of authorities to support that view.] The difficulty of the decision in *Russell's* case (1) is that inconsistent expressions of its grounds have been given by the Board. As to stare decisis, *Russell's* case (1) is a decision which has never been applied, and it has had the ground cut from under its feet. If the Board think that it is not a good decision, the appeal should not be rejected because, although it is an inadequate decision, it contains an error that is too ancient to rectify.

1946 A.C. p. 202.

1946. Jan. 21. The judgment of their Lordships was delivered by VISCOUNT SIMON. On June 1, 1939, the Lieutenant-Governor of Ontario in Council referred to the Supreme Court of Ontario under the provisions of the Constitutional Questions Act, R.S.O., c. 130, the following question: "Are Parts I., II. and III. of the Canada Temper-"ance Act, R.S.C. 1927, c. 196, constitutionally valid in "whole or in part, and if in part, in what respect?" On September 26, 1939, the Supreme Court by a majority (Riddell, Fisher, McTague and Gillanders JJ.A.) answered the question as follows: "This court is of opinion (Henderson "J. dissenting) that Parts I., II. and III. of the Canada "Temperance Act, R.S.C. 1927, c. 196, are within the "legislative competence of the Parliament of Canada." Against this judgment the Attorney-General for Ontario and the Moderation League of Ontario have appealed to the Judicial Committee, and their appeal has been supported by the Attorneys-General for Alberta and New Brunswick, who were admitted as interveners and were represented on the hearing. The appeal was opposed by counsel appearing for the Attorney-General for Canada and for several Temperance Federations.

The object of the appeal is to challenge the decision of this Board in the case of *Russell* v. *The Queen* (1), or at any rate to deny its applicability to the Act now in question. The majority of the Supreme Court held that that decision

(1) 7 App. Cas. 829.

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governed the present case and obliged it to answer the question referred to it in the affirmative. The statute which was declared to be within the legislative competence of the Dominion Parliament in *Russell's* case (1) was the Canada Temperance Act, 1878. That Act has been amended from time to time by the Dominion Parliament, and has been revised and re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the revision of Statutes of Canada. The last revision took place in 1927 under the provisions of the Dominion Act, 1924 (14 & 15 Geo. 5, c. 65) and now appears on the Statute Roll as the Canada Temperance Act, R.S.C. of 1927, c. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878.

The object of the Act of 1878 was to authorize the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the Dominion. By Part I. elaborate provisions are made for bringing the Act into force within the area of any county or city. Following on a petition to the Governor-General in Council supported by a certain proportion of the electors in the area, a poll is to be taken, and if a majority supports the petition an Order in Council is passed bringing the Act into effect in that area for a minimum of three years. Amendments have from time to time been passed dealing with portions of the Dominion which were not divided into counties and substituting electoral districts as the area in such cases, but it is unnecessary to set these out in detail. Part II. prohibits the sale of liquors in the areas in which the Act is brought into force, and Part III. provides for prosecution and penalties, which in some cases are severe, for breaches of the Act.

The Act having been passed in 1878, its constitutional validity was challenged in 1882 in *Russell's* case (1), which arose out of a conviction of the appellant Russell for unlawfully selling intoxicating liquor contrary to the provisions of Part II. of the Act. It was argued in that case that the Act was ultra vires of the Dominion Parliament on the ground that the matter was one which fell within s. 92 of the British North America Act and was therefore within the exclusive jurisdiction of the provincial legislatures.

(1) 7 App. Cas. 829.

The Board, however, held that the Act did not deal with any of the matters exclusively reserved to the provinces and upheld the validity of the statute on the ground that it related to the peace, order and good government of Canada. This decision has stood unreversed for sixty-three years. More than that, it has received the express approval of the Board in subsequent cases. A notable instance is to be found in *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (1). In that case Lord Watson, in delivering the judgment of the Board, said: "The judgment of this Board in *Russell* v *The* "*Queen* (2) has relieved their Lordships from the difficult "duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of "Canada in such sense as to bring its provisions within "the competency of the Canadian Parliament (3)." After pointing out that the provisions of the Act of 1878 were in all material respects the same as those embodied in the Act of 1886, which was the statute the Board had then to consider, he continued, "The reasons which were assigned "for sustaining the validity of the earlier, are, in their "Lordships' opinion, equally applicable to the later Act. "It therefore appears to them that the decision in *Russell* "v. *The Queen* (2) must be accepted as an authority to the "extent to which it goes, namely, that the restrictive "provisions of the Act of 1886, when they have been duly "brought into operation in any provincial area within the "Dominion, must receive effect as valid enactments relating "to the peace, order and good government of Canada (3)." In 1883, in the earlier case of *Hodge* v. *The Queen* (4), the Judicial Committee had referred to *Russell's* case (2) without any indication of disapproval, nor is any to be found in the judgment of Lord Macnaghten in *Att.-Gen. for Manitoba* v. *Manitoba Licence Holders' Association* (5), where the decisions of 1882 and of 1896 were contrasted. In many subsequent cases the case has been cited in judgments of the Board; it will be enough to mention *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* (The Insurers case) (6), the *Board of Commerce Act* case (7), and *King-Emperor* v. *Benoari Lal Sarma* (8). It was also quoted as an authority by Lord Atkin in his speech in the House of Lords in *Gallagher* v.

1946 A.C. p. 204.

(1) [1896] A.C. 348.
(2) 7 App. Cas. 829.
(3) [1896] A.C. 362.
(4) 9 App. Cas. 117.
(5) [1902] A.C. 73.
(6) [1916] 1 A.C. 588.
(7) [1922] 1 A.C. 191.
(8) [1945] A.C. 14.

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Lynn (1), a case relating to the legislative powers of the Parliament of Northern Ireland.

But in 1925 *Russell's* case (2) was commented on in a judgment of the Judicial Committee delivered by Lord Haldane in *Toronto Electric Commissioners* v. *Snider* (3), and it is on this comment that the present appellants largely rely in support of their contention that it was wrongly decided. After contrasting that case with other decisions of the Board already mentioned above, Lord Haldane said: "It appears to their Lordships that it is "not now open to them to treat *Russell* v. *The Queen* (2) "as having established the general principle that the mere "fact that Dominion legislation is for the general advantage "of Canada, or is such that it will meet a mere want which "is felt throughout the Dominion, renders it competent if "it cannot be brought within the heads enumerated speci- "fically in s. 91. . . . . No doubt there may be cases arising "out of some extraordinary peril to the national life of "Canada, as a whole, such as the cases arising out of a war, "where legislation is required of an order that passes beyond "the heads of exclusive Provincial competency" (4). And later he said "Their Lordships think that the decision in "*Russell* v. *The Queen* (2) can only be supported to-day, "not on the footing of having laid down an interpretation, "such as has sometimes been invoked, of the general words "at the beginning of s. 91, but on the assumption of the "Board, apparently made at the time of deciding the case "of *Russell* v. *The Queen* (2), that the evil of intemperance "at that time amounted in Canada to one so great and so "general that at least for the period it was a menace to the "national life of Canada so serious and pressing that the "National Parliament was called on to intervene to protect "the nation from disaster. An epidemic of pestilence "might conceivably have been regarded as analogous" (1).

The first observation which their Lordships would make on this explanation of *Russell's* case (2) is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of

(1) [1937] A.C. 863.
(2) 7 App. Cas. 829.
(3) [1925] A.C. 396.
(4) [1925] A.C. 412.

an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act, and no objection was raised to it on that account. In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (1) and the *Radio* case (2)), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen* (3), Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

1946 A.C. p. 206.

It is to be noticed that the Board in *Snider's* case (4) nowhere said that *Russell* v. *The Queen* (3) was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

The appellants' first contention is that *Russell's* case (3) was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more

(1) [1932] A.C. 54.
(2) [1932] A.C. 304.
(3) 7 App. Cas. 829.
(4) [1925] A.C. 396.

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than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it. Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the British North America Act, which have been expounded in so many reported cases; so far as the Canada Temperance Act, 1878, is concerned the question must be considered as settled once and for all.

1946 A.C. p. 207.

The second contention of the appellants was that in 1927, when the statute now in force was enacted, there were no circumstances which enabled the Parliament of the Dominion to legislate anew. As has already been said, the Act of 1927 is, in all respects material for this appeal, identical in its terms with the Act of 1878, and also with the Act of 1886, which itself was a revised edition of 1878 and was the Act in force in 1896 when the case of *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (1) was heard. It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act. Then it was said (and this, apparently, was the opinion of Henderson J.A., who dissented from the other members of the Supreme Court of Ontario) that no circumstances could exist in 1927 to support

(1) [1896] A.C. 348.

the Act, in view of the legislation that had been passed in the provinces, including Ontario, for the regulation of the liquor traffic. Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was ultra vires. The same ground is not covered by provincial legislation setting up a licensing system and making the sale of liquor a government monopoly. Moreover, if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. It is to be noted that in 1896 Lord Watson's judgment (1) appears to take it for granted that the position was in no way affected by the fact that the Act of 1878 had been repealed and replaced by the Act of 1886.

1946 A.C. p. 208.

Accordingly, their Lordships are not prepared to hold either that *Russell* v. *The Queen* (2) was wrongly decided or that it has ceased to be a binding authority by reason that the Act of 1878 has been re-enacted in 1927. It is by repeal by the Dominion Legislature, and not by appeal to the

(1) [1896] A.C. 348. (2) 7 App. Cas. 829.

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Judicial Committee, that the enactment might cease to be effective. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There should be no costs awarded in respect of the appeal.

Solicitors for the appellants and the interveners: *Blake & Redden.*

Solicitors for the respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J.C.*
1946

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.. } APPELLANT;

July 31.

AND

1946 A.C. p. 527.

THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Tax on dividends received by non-residents from Canadian debtors—Extra-territorial operation—Constitutional validity—"Residence" as test of "Canadian" debtor—Income War Tax Act, R. S. C. 1927, *c.* 97, *as added by c.* 41 *of S. C.* 1932-33, *s.* 9B, *sub-s.* 2 *(a)—British North America Act,* 1867 (30 & 31 *Vict., c.* 3), *s.* 91 (3.)—*Statute of Westminster,* 1931 (22 *Geo.* 5, *c.* 4), *s.* 3.

By s. 9B, sub-s. 2 *(a)*, which was added to the Income War Tax Act, R. S. C. 1927, c. 97, by c. 41 of the S. C., 1932-33, it was provided that: "In addition to any other tax imposed by this Act an income tax of "five per centum is hereby imposed on all persons who are non-residents "of Canada in respect of *(a)* all dividends received from Canadian "debtors irrespective of the currency in which the payment is made."

The effect of s. 3 of the Statute of Westminster, 1931, which provides that "the Parliament of a Dominion has full power to make laws having "extra-territorial operation," on head 3 of s. 91 of the British North America Act, 1867, under which the Dominion Parliament may make laws in respect to "the raising of money by any mode or system of "taxation," is to add to head 3 of s. 91 of the words "even though such "laws have an extra-territorial operation." Section 9B, sub-s. 2 *(a)*, of the Income War Tax Act, imposing a tax on non-residents, was accordingly intra vires the Dominion legislature.

The test to be applied in deciding who is a "Canadian debtor" within the meaning of s. 9B, sub-s. 2 *(a)*, of the Income War Tax Act is not the test of nationality in an individual or of registration in a company, but the test of residence, and the appellant company, which was incorporated in the United Kingdom, with its registered office in England, was resident in Canada in the sense in which "residence" is attributed to an incorporated company for income tax purposes, where its whole business was in substance controlled, managed, conducted and carried on in Canada. The appellant company was accordingly a "Canadian debtor" within the meaning of s. 9B, sub-s. 2 *(a)*, of the Act in respect of dividends paid to non-resident shareholders, and was liable in proceedings taken by the Crown to recover the amount of tax not withheld as required by the Act from dividends paid to such shareholders. 1946 A.C. p. 528.

Section 84 of the Income War Tax Act, which imposes a penalty on any person who fails to collect or withhold any sum as required by the Act, is absolute in its terms and cannot be read with the qualification that the receipt referred to in s. 87 of the Act must give effective protection to the company in every case.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 45 of 1946), by special leave, from a judgment of the Supreme Court of Canada (February 11, 1946), which

* *Present:* VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

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reversed a judgment of the Exchequer Court of Canada (May 25, 1945).

The action out of which this appeal arose was brought by the respondent, on the information of the Attorney-General for Canada, to recover the amount of tax and interest thereon which it was alleged that the appellant company should have withheld from dividends paid to such holders of its five per cent. cumulative perpetual preference stock as were non-residents of Canada during the period between April 1, 1933, and April 29, 1941. The appellant company was incorporated in the United Kingdom; its registered office was in England, where the register of members holding substantially all the five per cent. cumulative preference stock was kept. There was also a Dominion register in Canada for members registered in Canada. The business of the company was carried on in British Columbia, where it operated electric railways, and also manufactured and sold heat, light and power. The shareholders' and directors' meetings were held in Canada, and the dividends were declared there.

The questions in the appeal were *(a)* whether the appellant company was a "Canadian debtor" within the meaning of s. 9B, sub-s. 2 *(a)* of the Income War Tax Act of Canada, and *(b)* whether s. 9B, sub-s. 2 *(a)* was a valid exercise of the legislative powers of the Dominion Parliament.

Section 9B of the Income War Tax Act, R. S. C. 1927, c. 97, as added by c. 41 of S. C. 1932-33, and as at April, 29, 1941, provided that:—"9B.—(1.) In addition to any other tax "imposed by this Act an income tax of five per centum is "hereby imposed on all persons resident in Canada, except "municipalities, or municipal or public bodies which in the "opinion of the Minister perform a function of government, "in respect of all interest and dividends paid by Canadian "debtors, directly or indirectly to such persons, which "interest by the terms of the mortgage deed, hypothec or "other instrument under which the debt was contracted or "which dividends by the terms of issue, are payable in a "currency which is at a premium in excess of five per centum "in terms of Canadian funds.

1946 A.C. p. 529.

"(2.) In addition to any other tax imposed by this Act an "income tax of five per centum is hereby imposed on all "persons who are non-residents of Canada in respect of

"*(a)* All dividends received from Canadian debtors "irrespective of the currency in which the payment is "made, and

"*(b)* All interest received from or credited by Canadian "debtors, if payable solely in Canadian funds except the "interest from all bonds of or guaranteed by the Dominion of "Canada.

. . . . . .

"(4.) In the case of interest or dividends in respect of "fully registered shares, bonds, debentures, mortgages or "any other obligations, the taxes imposed by this section "shall be collected by the debtor who shall withhold five "per centum of the interest or dividend on the obligation "and remit the same to the Receiver-General of Canada.

. . . . . .

"(9.) Every agreement for payment of interest or divi- "dends in full without allowing any such deduction or "withholding shall be void."

. . . . . .

By s. 84.—"(1.) Any person who fails to collect or with- "hold any sum of money as required by this Act or regula- "tions made thereunder, shall be liable for the amount which "should have been collected or withheld together with "interest at the rate of ten per centum per annum.

"(2.) Any person who fails to remit any sum of money "collected or withheld as required by this Act, or at such "time as the Minister may in special cases prescribe, shall "in addition to being liable for such sum of money so collected "or withheld, be liable to a penalty of ten per centum of the "said sum together with interest at the rate of ten per "centum per annum."

. . . . . .

By s. 86.—"No action shall lie against any person for "withholding or deducting any sum of money as required by "this Act or regulations made thereunder."

By s. 87.—"The receipt of the Minister for any sum of "money collected, withheld or deducted by any person as "required by this Act or regulations made thereunder shall "constitute a good and sufficient discharge of the liability of "any debtor to his creditor with respect thereto to the extent "of the amount referred to in the receipt."

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The Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock JJ.), reversing the judgment of the President of the Exchequer Court (Thorson J.), held that the Income War Tax Act, s. 9B, sub-s. 2, was intra vires the Parliament of Canada, that the appellant company was a "Canadian debtor" within the meaning of the section, and that the action succeeded.

1946. July 4, 8, 9, 10. *Hon. J. W. Farris K.C.* and *A. Bruce Robertson* (both of the Canadian Bar) for the appellant company. Sections 86 and 87 of the Income War Tax Act appear to be the keystone of the arch. The Act, as amended, sets up a definite scheme for collecting taxes at source; the tax is imposed under s. 9B, sub-s. 2 *(a)*, solely on the non-residents—not on the company—and the company is the compulsory tax collector on behalf of the Government. It is by s. 86 and, particularly, s. 87, that the Government seeks to reach the property of the non-resident shareholder through the Canadian debtor, and it is only to the extent that these sections are effectively operative that the machinery for collecting the tax can succeed. In other words, it is only when a receipt given under s. 87 constitutes a good and sufficient discharge that this plan of collecting through the company at the source is effective and operative. Section 9B, sub-ss. 2, 4, 8 and 9, and ss. 84, 86 and 87 are all tied together, and are all machinery for this one purpose of collecting at source. The contract made between the company and its shareholders is an English contract, made in England; the moneys are to be paid in England, the situs of the shares is there, as also is the registered transfer office of these shares. This Act purports to tax a non-resident in relation to an asset which he owns in England, and there is neither property nor individual subject to the tax available in Canada on which the tax can be imposed in this particular case. The proper law of the obligation is English, and there is no power in the Canadian Parliament to give a valid receipt under s. 87; the provisions of the Canadian Act would afford the appellant no protection in an action brought in the English courts to recover any part of the dividends which might have been withheld. If there cannot be a valid discharge under s. 87 the company is not collecting at all, it is paying out of its own pocket. The position in *Trinidad Lake Asphalt Operating Co., Ld.* v. *Commissioners of Income Tax for*

1946 A.C. p. 531.

Trinidad and Tobago (1) is the exact opposite of that in this case.

The appellant is not a "Canadian debtor" within the meaning of sub-s. 2 *(a)* of s. 9B of the Act. The word "Canadian" in the phrase "Canadian debtor" cannot mean a debtor company carrying on its business in Canada or a debtor "resident in Canada" because that is in no sense the natural meaning of the word. One of the essentials of a "Canadian debtor" is that he owes a debt which itself is Canadian according to the law of Canada. It is a reasonable interpretation that the debt colours the meaning of debtor. There are many factors which go to making up a Canadian debtor, but the important thing here is the debt; that must govern the effectiveness of non-effectiveness of s. 87, and therefore it is submitted that it is within the very essence of "Canadian debtor" here to say that the kind of debt the person owes gives the correct colour to what he himself is. He is not a Canadian debtor within the meaning of s. 9B, sub-s. 2 *(a)*, unless it is a Canadian debt. If "Canadian "debtor" means no more than a debtor resident in Canada, then the Parliament of Canada has made a law purporting to alter contractual obligations which are not necessarily subject to Canadian law at all. In the circumstances of this case where, inter alia, the company is registered in England, the proper law of the obligation is English. [Reference was made to *Spiller* v. *Turner* (2), *Martin* v. *Nadel* (3), *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (4), *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (5), *Indian and General Investment Trust, Ld.* v. *Borax Consolidated, Ld.* (6), and *London and South American Investment Trust* v. *British Tobacco Co. (Australia)* (7), where *Brassard* v. *Smith* (8) is referred to.] The test of a "Canadian debtor" is whether he owes a debt the proper law of which is Canadian, and the proper law of the appellant's debt in respect of declared dividends being English, the appellant cannot be said to be a "Canadian debtor."

It is further contended that if the appellant company is a "Canadian debtor" within the meaning of s. 9B, sub-s. 2 *(a)*, then that section is ultra vires. The provisions of s. 9B,

1946 A.C. p. 532.

(1) [1945] A. C. 1.
(2) [1897] 1 Ch. 911, 918.
(3) [1906] 2 K. B. 26.
(4) [1923] 1 K. B. 673, 678-9.
(5) [1898] A. C. 349, 355, 359.
(6) [1920] 1 K. B. 539.
(7) [1927] 1 Ch. 107, 117-8, 119.
(8) [1925] A. C. 371.

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sub-s. 2, purport to tax a non-resident in respect of property out of the jurisdiction. The extra-territorial power given to the Parliament of Canada under the Statute of Westminster is limited to the extension of existing powers; s. 3 of the Statute of Westminster has not had the effect of conferring on the Dominion an independent power to legislate extra-territorially, but has merely abrogated certain limitations and disabling restrictions which previously existed on the Dominion's powers of legislation. There still exist the assigned limits of subject and area: *British Coal Corporation* v. *The King* (1). The Statute of Westminster has not given Canada power to originate legislation which it had no power to deal with before. The power to tax a non-resident in regard to extraneous property never was within the jurisdiction of the Canadian Parliament, and a power that Canada never had cannot be extended.

A. Bruce Robertson followed. The meaning we give to "Canadian debtor" in s. 9B, sub-s. 2, is entirely in accord with the language used in Buckley on The Companies Acts, 11th ed., p. 317. The fact that there never was actually in Canada any money belonging to the shareholder is another indication that the debt is an English debt. [Reference was made to *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (2), *Wallace* v. *Attorney-General* (3), *Harding* v. *Commissioner of Stamps for Queensland* (4), *Provincial Treasurer of Alberta* v. *Kerr* (5) and *Forbes* v. *Attorney-General for Manitoba* (6).] Every attempt is made to see that it is the shareholder, and not the company, who bears the tax: s. 9B, sub-s. 9; s. 87. With regard to the submission that s. 9B, sub-s. 2 *(a)*, is ultra vires, two tests should be applied to determine whether or not any extra-territorial legislation is good, and both must be satisfied for it to be good. The first is, is the legislation within the accepted rules of international law? The second text is, is the legislation within the limits assigned by the British North America Act, 1867? The tax here is on stockholders who neither reside in, nor owe allegiance to, Canada; the situs of the debt, which is the property in respect of which the tax is imposed, is in England; and for those reasons the section imposing the tax is extra-territorial

(1) [1935] A. C. 500.
(2) [1898] A. C. 349, 355.
(3) (1865) L. R. 1 Ch. 1, 9.
(4) [1898] A. C. 769, 773.
(5) [1933] A. C. 710, 720.
(6) [1937] A. C. 260, 265, 269.

legislation: *Blackwood* v. *The Queen* (1); *Commercial Cable Co.* v. *Attorney-General for Newfoundland* (2); *London and South American Investment Trust* v. *British Tobacco Co. (Australia)* (3); *Trinidad Lake Asphalt Operating Co., Ld.* v. *Commissioners of Income Tax for Trinidad and Tobago* (4) and *Provincial Treasurer of Alberta* v. *Kerr* (5). In testing the validity of extra-territorial legislation since the Statute of Westminster the two tests already mentioned must be applied: only such legislation as is competent as a matter of international law is authorized by s. 3 of the Statute of Westminster: s. 3 was not intended to confer any futile power; it was merely intended to abrogate the restrictions on power which already existed. A law which has extra-territorial operation can only operate extra-territorially in other jurisdictions if the power of the enacting State is recognized in the other jurisdiction as existing. The Dominion has full power to make laws, but that does not mean unlimited power, but power up to the capacity of the Dominion to exercise effectively. A statute cannot operate unless it is effective. For extra-territorial legislation to be recognized as valid it must be good in private international law. With regard to the second test, it is submitted that any law made by the Dominion Parliament must still be for the peace, order and good government of Canada: British North America Act, 1867, s. 91. The points in support of this argument to be derived from *British Coal Corporation* v. *The King* (6) are: *(a)* The extent of the Dominion's legislative competence must still be ascertained by the British North America Act, and certain limitations still flow from it. *(b)* The Dominion has supreme power only within the limits of subject and area assigned to it by the Constitution Act. *(c)* The effect of the Statute of Westminster is said to have been to abrogate certain limitations, not to grant any new powers. *(d)* The prerogative appeal which the Dominion was held competent to limit is simply one element in the general system of appeals in the Dominion. *(e)* The right of self government and nothing more was stressed, and *(f)* if s. 3 confers an independent power of legislation and there is no limitation on it, the Board were, with respect, wasting their breath in pronouncing as they did: all

(1) (1882) 8 App. Cas. 82, 95.
(2) [1912] A. C. 820, 826.
(3) [1927] 1 Ch. 107, 114.
(4) [1945] A. C. 1, 7.
(5) [1933] A. C. 710, 717-8.
(6) [1935] A. C. 500.

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they need have said was, this is extra-territorial legislation and so it is intra vires. [Reference was also made to *Nadan* v. *The King* (1), *Croft* v. *Dunphy* (2) and *Attorney-General for Ontario* v. *Attorney-General for Canada* (3).] A law imposing taxation on persons outside Canada in respect of property outside is not a law for the peace, order and good government of Canada—it is making a law for people in places outside Canada. Section 9B, sub-s. 2 *(a)*, and s. 9B, sub-s. 9, and s. 87 are all part of one scheme and must stand or fall together.

Pritt K.C., *Gahan* and *W. R. Jackett* (of the Canadian Bar) for the respondent. There are nine propositions to support the submission that the appellant company is a "Canadian debtor": Firstly, the proper law of this debt is Canadian law. Canada is a sovereign State, and since the Statute of Westminster is as fully entitled to legislate as Great Britain or France: *Croft* v. *Dunphy* (2). The subject-matter here is debt, not contract. This particular debt is one to which the law of Canada, and not the law of England, applies; it is a debt which comes into existence in Canada, and cannot come into existence anywhere else. The appellant's head office is in Canada; all its general meetings must be held there, as well as all meetings of the board of directors; only residents of Canada can be directors, and the company's offices must reside there; the appellant's seal is, and must be kept, in Canada, and its whole business is in substance controlled, managed, conducted and carried on in Canada. The whole of the dividends is also earned in Canada. The company is admittedly resident in Canada and nowhere else. In the light of those facts the assertion for the appellant that nothing that was sought to be taxed was in Canada—neither property nor individual—is subject to some modification. The second proposition is that this debt is situated in Canada. The place where the debt is to be paid is an important consideration, and the proper inference from the law is that the situs of the debt is where the debtor resides: Dicey's Conflict of Laws, 4th ed., p. 344 et seq. [Reference was made to *Raleigh Investment Co., Ld.* v. *Governor-General in Council* (4) and *Evling* v. *Israel & Oppenheimer, Ld.* (5).] The proper law of these debts, when the shareholder is

(1) [1926] A. C. 482.
(2) [1933] A. C. 156.
(3) [1912] A. C. 571, 583-4.
(4) [1944] F. C. R. 229.
(5) [1918] 1 Ch. 101.

resident in Canada, must be the law of Canada, and when there is a bunch of contracts the court should say that all those contracts should be subject to the same law: *Lloyd* v. *Guibert* (1). Thirdly, the appellant is also a Canadian debtor because the company is resident in Canada; fourthly, because the Dominion Parliament has power over this debt; fifthly, because s. 9B, sub-s. 2 *(a)*, can be effectively operated to impose and collect this tax; sixthly, s. 84 is valid and effective—that is the section which imposes a penalty for failure to collect. The seventh proposition is that s. 9B, sub-s. 2, as a matter of construction, can be, and should be, applied independently of s. 87; it can be applied irrespective of whether or not s. 87 gives the relief it is intended to give in a particular case. There is nothing in the words of the section, which ought to be read in their ordinary form, against that submission, and secondly, since it was said that in order to avoid injustice s. 87 should be read to link up with s. 9B, sub-s. 2, there are various sections in the Act where there are similar provisions and where any attempt to link up s. 87 with those is defeated by the plain provision of the words: s. 19, sub-s. 2; s. 25, sub-s. 2; s. 27, sub-ss. 2, 4, 5; s. 72, sub-s. 2; s. 91, sub-ss. 5, 6, 11, 16 and 17. The eighth proposition is that in a case like this an English court in an English action will recognize the validity of the discharge—assuming that it is governed by English law: *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* (2); Dicey's Conflict of Laws, 4th ed., p. 618, r. 160. Assuming that English law is the law of the debt or the contract, then if part of the contract has to be performed in a foreign jurisdiction the English courts will say that if something is prohibited by the law of that jurisdiction then in applying the English law we will recognize the difficulties and laws of the foreign jurisdiction. The English courts would recognize a s. 87 discharge because English courts will see that the Canadian tax collector does get effective jurisdiction over the debt, because the debt is created and situated in Canada. The English courts will recognize a penal restriction imposed by the law of another country. [Reference was made to Dicey's Conflict of Laws, 5th ed., p. 657, exception 3; pp. 658, 671, r. 161, sub-r. 3; p. 673, and to *Vita Food Products, Inc.* v. *Unus Shipping Co.* (3);

(1) (1865) L. R. 1 Q. B. 115, 119, 122, 127.
(2) [1920] 2 K. B. 287.
(3) [1939] A. C. 277, 291.

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Buckley on The Companies Acts, 11th ed., p. 317; *Spiller* v. *Turner* (1); *Indian and General Investment Trust, Ld.* v. *Borax Consolidated, Ld.* (2); *London and South American Investment Trust* v. *British Tobacco Co. (Australia)* (3); *Delage* v. *Nugget Polish Co., Ld.* (4); *Trinidad Lake Asphalt Operating Co., Ld.* v. *Commissioners of Income Tax for Trinidad and Tobago* (5), and the authorities cited on behalf of the appellant.] The ninth and last proposition is that the validity of this Canadian discharge in a Canadian court could not be allowed to depend on what foreign courts may do in their own courts. The appellant is a Canadian debtor within the meaning of s. 9B, sub-s. 2 *(a)*, of the Income War Tax Act.

[He was not required to deal with the question whether the section was intra vires.]

J. W. Farris K.C., replied. The law of this contract is governed by English, not Canadian, law. As to the suggested distinction between the debt and the contract, it is difficult to separate them so as to make the contract in England and the debt in Canada. The respondent says that the situs of the debt is the residence of the debtor, but an entirely different rule applies here and different authorities govern the case, for what has to be established is whether or not the Canadian Parliament can modify the English obligation: Dicey's Conflict of Laws, 5th ed., p. 337, r. 76; *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (6). It is the law of the contract which creates the obligation that must govern whether or not the plaintiff in an action on his debt is to recover the whole of his debt, and the Parliament of a foreign country cannot modify the terms or conditions of that contract: *Jacobs, Marcus & Co.* v. *Credit Lyonnais* (7).

July 31. The judgment of their Lordships was delivered by VISCOUNT SIMON. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada, dated February 11, 1946, which allowed the appeal of the present respondent from a judgment of the Exchequer Court of Canada, dated May 25, 1945. The action was brought by the present respondent to recover the amount of a tax,

(1) [1897] 1 Ch. 911, 912, 919.
(2) [1920] 1 K. B. 539, 548.
(3) [1927] 1 Ch. 107.
(4) (1905) 92 L. T. 682, 685.
(5) [1945] A. C. 1, 6-8.
(6) (1890) 25 Q. B. D. 399, 405.
(7) (1884) 12 Q. B. D. 589, 595, 600.

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and interest thereon, which it was alleged that the present appellant should have withheld from dividends paid to such holders of its five per cent. cumulative perpetual preference stock as were non-residents of Canada during the period between April 1, 1933, and April 29, 1941. The Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock JJ.), reversing the judgment of the President, held that the action, which took the form of an Information of the Attorney-General for Canada filed on April 1, 1943, succeeded.

[His Lordship set out the sections of the Income War Tax Act, on which the controversy turns, namely, s. 9B, sub-ss. 1, 2, 4, 9 and ss. 84, 86 and 87, and continued:] Thus, by s. 9B, sub-s. 2 *(a)*, it is provided that non-residents of Canada are taxed in respect of all dividends received from Canadian debtors, and by s. 9B, sub-s. 4, the tax is to be collected by the Canadian debtor, who is to withhold five per cent. of the dividend and remit the same to the Receiver-General of Canada. The appellant failed to do this, and the Attorney-General for Canada claims that it is accordingly liable under s. 84, sub-s. 1, for the amount, with interest at the rate of ten per cent. per annum on it. The appellant company resists this claim, contending that it is not a "Canadian debtor" within the meaning of the section above quoted, and secondly, that if it is a "Canadian debtor" within the meaning of these sections, the legislation is ultra vires the Parliament of Canada, notwithstanding the Statute of Westminster of 1931.

On the first question the Exchequer Court took the view that a "Canadian debtor" meant a debtor of Canadian nationality and, as applied to a company (which is plainly included by reason of the reference to dividends) meant a company registered under Canadian law. It is not, perhaps, entirely clear from the President's judgment whether he would regard a company incorporated under the law of a Canadian province as a "Canadian debtor" in respect of its dividends or whether he would apply the term only to companies registered under Dominion law, but the material point is that he considered the test to decide who was a "Canadian debtor" in the case of an individual depended on the individual's nationality and not on his place of residence, and therefore logically held that in the case of an incorporated company the test was the place of the in-

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corporation of the company and not its place of "residence" as understood in the law relating to companies, i.e., the place where the company had its "head and seat."

In the present case there could be no doubt at all that the "residence" of the appellant company was Canadian. The company was incorporated in the United Kingdom and had its registered office in England. It was registered in British Columbia as an extra-provincial company under the Companies' Act, 1897, of British Columbia. Under the Companies' Act, 1929, of the United Kingdom (19 & 20 Geo. V., c. 23) its register of members was kept at its registered office, and under s. 103 of that Act it kept a Dominion register of members resident in Canada at its offices at Vancouver. The stock on this register can be transferred only on such register, but all other stock can be transferred only on the register kept in England. More important than these technical details, however, are the following facts, which left it beyond dispute that the company, though of United Kingdom origin, was "resident" in Canada. The company carried on the business of supplying electric power and light and operating electric railways and motor omnibuses in British Columbia, and had its head office at Vancouver. Since 1929 the whole business of the company, except certain formal administrative business, was required by its articles of association to be controlled, managed, conducted and carried on in Canada. All general meetings of the company and all meetings of directors were required to be held in Canada, and all directors were required to be resident in Canada. All its assets, excepting certain records and books of accounts kept at its registered office in England, and certain cash remitted there from time to time, were situated in Canada. All the income from which its dividends were paid was earned in Canada. In short, the undertaking of the company which produced its profits was in every respect Canadian and, in the sense in which "residence" is attributed to an incorporated company for income tax purposes, the "residence" of the appellant was unquestionably Canadian.

The Supreme Court rejected the view of the President of the Exchequer Court and held that "Canadian debtors" means debtors who are resident in Canada and that as applied to companies the phrase is equivalent to companies resident in Canada who owe dividends to their shareholders. Their Lordships agree with this view. It is true that there

are sections in the Income War Tax Act where the test of residence in Canada is expressly applied both with respect to individuals and companies, but it does not follow that "Canadian debtors" may not have the same meaning as debtors resident in Canada. If the view contended for by the appellant on this point were adopted, extraordinary results would follow. A Canadian citizen who owed a debt for interest would be caught by the Act wherever he resided, purely because of his nationality. The language of the statute would require him to make a deduction when paying his debt, say, when paying interest on a loan made to him by a foreigner, though neither of them was residing in Canada, and to transmit the amount deducted to the Receiver-General of Canada. The view which their Lordships reject would require a company registered in Canada but carrying on all its business and making all its profits at the other end of the world, to deduct the amount of the tax when paying a dividend to its shareholder, wherever the shareholder might be found, and whatever his nationality might be, although there was nothing whatever Canadian about the circumstances except the place of registration of the company. It appears to their Lordships that the test to be applied in deciding who is a "Canadian" debtor is not the test of nationality in an individual or of registration in a company, but the test of residence. On this first point, therefore, their Lordships must decide against the appellant. The appellant is within the language of the Act.

Next, it is contended by the appellant that, even though it is to be regarded as a "Canadian" debtor, the duty imposed on it by sub-s. 4 of s. 9B does not, on the true construction of the Act, extend to the case where dividends are being paid to persons who are non-residents of Canada because s. 84 and s. 87 must be regarded as inter-related sections so that the penalty imposed by s. 84 can only be inflicted in instances where the receipt of the Minister under s. 87 constitutes a good discharge of the company's liability to its shareholder in any court in which the shareholder sues for the balance of his dividend. The company, being registered in England, could be sued in an English court for any part of the dividend which was unpaid, and the appellant contends that if this happened the receipt of the Minister under s. 87 would not provide it with an adequate defence for withholding the amount of the tax, and that therefore if the company in

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such a case withheld the amount of the tax and remitted it to the Receiver-General of Canada, it would have to pay the same amount to the shareholder as well, and thus in effect would itself be taxed instead of the shareholder. This argument is reinforced by pointing out that the tax in question is, by sub-s. 2 of s. 9B expressly imposed on the non-resident shareholder and is not described as a further tax on the company or its profits.

Their Lordships have given full consideration to this argument, which is by no means without weight. But in their view the governing consideration is that s. 84 is absolute in its terms and cannot be read with the qualification that the receipt referred to in s. 87 must give effective protection to the company in every case. Their Lordships are therefore not required to decide whether the appellant is right in saying that if a shareholder sued the appellant in England for a portion of the dividend which the appellant has withheld, the receipt of the Minister would, or would not, in an English court provide a valid discharge. The appellant contends it would not, and reference may be made to such cases as *Spiller* v. *Turner* (1) and *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (2), as well as to Dicey's Conflict of Laws, 5th ed., p. 678 et seq. The respondent, on the other hand, does not admit that the receipt would fail to provide the appellant with an efficient shield in an English court. Their Lordships' conclusion does not require them to decide on this point of controversy, if controversy there be, for, as already stated, the Board does not take the view that the appellant has no liability to deduct unless s. 87 provides it in all courts with a sufficient discharge. If the shareholder who claims that the appellant has not paid him the full amount to which he is entitled brings his action in the Canadian courts, s. 87 will, of course, provide the appellant with a defence, for Canadian law gives a valid discharge. But whether this is so or not in the event of a shareholder suing the appellant in England, the fact remains that s. 84 requires the appellant to make the deduction and to remit the amount and imposes, without qualification, a liability to the prescribed penalty if it fails to do so. The declared objective of s. 9B, sub-s. 2, is, no doubt, to make the non-resident bear the tax, but the circumstance that the

1946 A.C. p. 540.

(1) [1897] 1 Ch. 911. (2) [1898] A. C. 349.

machinery provided by the Act may in certain circumstances work so as to make the company the sufferer, is no reason for construing s. 84 as though it only applied with a qualification which is neither expressed nor necessarily implied. It would, indeed, be exceedingly difficult to determine whether the penalty imposed by s. 84 could properly be exacted if the right to exact it depended on the question in what court an aggrieved shareholder might thereafter sue for his dividend, and what are the correct propositions of private international law which would determine whether the appellant would have a good defence if it was sued in the country of its registration.

Finally, the appellant contends that if the sections of the Income War Tax Act on which this case turns bear the construction set out above, s. 9B, sub-s. 2 *(a)* is ultra vires the Parliament of Canada, notwithstanding the enlarged scope conferred by the Statute of Westminster of 1931. The Judges of the Supreme Court of Canada have dealt in a most effective fashion with this contention, and their Lordships entirely concur with the views they have expressed. Kerwin J. in a judgment with which the Chief Justice of Canada and Taschereau J. concurred, observed that s. 3 of the Statute of Westminster left no basis for the argument, and he went on: "by head 3 of s. 91 of the British North "America Act [the Canadian] Parliament was authorized "to make laws with reference to 'the raising of money by " 'any mode or system of taxation.' As long as Parliament "legislates with reference to such matters the permitted "scope of the legislation is not restricted by any considera- "tion not applicable to the legislation of a fully sovereign "state. Such a state may tax persons outside its territory. "Here it is clear that it has done so and the Canadian courts "must obey the enactment."

1946 A.C. p. 541.

Rand J., with whom Kellock J. agreed, put the matter thus: "The legislative competence of Parliament to tax non- "residents was challenged. It is argued that the power 'to " 'make laws having extra-territorial operation' as enacted "by the Statute of Westminster (1931), s. 3, is subject to two "conditions: that the legislation deal with matter assigned by "the British North America Act to the federal legislature; "and that it be of such a nature as under international public "or private law would be accorded extra-territorial effect. "It is then contended that the power of the Dominion under

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"s. 91 (3.), 'the raising of money by any mode or system of "'taxation' does not extend to taxation of non-citizens "outside the boundaries of Canada; and that international "comity, apart from any rule against giving effect in one "state to fiscal measures of another state, would not for "any purpose recognize the validity of, much less enforce, "what Parliament is said to purport by this legislation to do.

"The power of the Dominion to tax is to be interpreted as "being 'as plenary and as ample within the limits prescribed "'. . . as the Imperial Parliament in the plenitude of its "'power possessed or could bestow': *Hodge* v. *The Queen* (1). "But there is obviously a distinction between the standing of "legislative enactments by a sovereign state within its boun- "daries and beyond them. In an effective sense, a declaration "by such a legislature that it imposes a tax upon a citizen of a "foreign country toward whom there is no internationally
1946 A.C. p. 542. "recognized bond or relation, is, beyond the territories of "that state, a futile act, and it is futile for the reason that "beyond them it is incapable of enforcement. Within the "state, however, it becomes an obligatory rule to be enforced "whenever enforcement is feasible. The specific investment "of extra-territorial power by s. 3 of the statute of 1931 was "designed no doubt to remove the generally accepted limita- "tion of colonial legislative jurisdiction, a limitation which "the courts of the colony itself were bound to recognize: "*Macleod* v. *Attorney-General for New South Wales* (2): and "any such jurisdictional inadequacy no longer hampers the "legislative freedom of the Dominion. Within its field, "there is now a legislative sovereignty. That the enactment "of s. 9B is an exercise of taxing power within that jurisdic- "tion does not, I think, admit of doubt. It is an assessment "uniformly imposed in respect of special items of a general "class of defined subject-matter in an elaborated tax "system; there is admitted jurisdiction over an act essential "to the subject-matter, i.e., the act of performance of an "obligation; and these, taken with the language used, satisfy "the taxation criteria. Legislation so enacted will be effec- "tive in, and must be enforced by, the courts of this country. "To what extent, if at all, it will receive recognition in the "tribunals of foreign countries depends upon different "considerations: but that circumstance, apart from its

(1) (1883) 9 App. Cas. 117, 132. (2) [1891] A.C. 455.

"function in interpretation, is not one in which the local "tribunal is interested."

Their Lordships would point out that what is here in issue is the extent of the legislative power of a Dominion legislature having regard to the language of the Statute of Westminster. This is not the same question as the question whether legislative power is so used as to extend beyond what will prove to be effective. A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of its country must enforce the law with the machinery available to them. The law in this case has been validly enacted, for the effect of the Statute of Westminster upon s. 91 of the British North America Act, head 3, is to make that head read: "the raising "of money by any mode or system of taxation, even though such laws have an extra-territorial operation."

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed, with costs. 1946 A.C. p. 543.

Solicitors for appellant: *Linklaters & Paines.*

Solicitors for respondent: *Charles Russell & Co.*

J.C.* 1946 Dec. 2.

1947 A.C. p. 87.

[PRIVY COUNCIL.]

CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS AND ANOTHER ..... } APPELLANTS;

AND

ATTORNEY-GENERAL FOR CANADA AND ANOTHER ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Orders in Council—Deportation to Japan of specified persons—Deprivation of status as British subject or Canadian national—Deportation of wives and children of deported persons—Validity—War Measures Act, R. S. C. 1927, *c.* 206, *ss.* 3, 6—*National Emergency Transitional Powers Act*, 1945, *S. C., c.* 25, *ss.* 2 *(e)*, 4—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17) *(as amended to* 1922) (12 & 13 *Geo.* 5, *c.* 44), *s.* 9—*Colonial Laws Validity Act*, 1865 (28 & 29 *Vict., c.* 63), *ss.* 2, 3—*Statute of Westminster*, 1931 (22 *Geo.* 5, *c.* 4), *s.* 2—*Orders in Council of Dec. 15*, 1945 *(P. C.* 7355, 7356, *and* 7357*) of Canada.*

1947 A.C. p. 88.

Three Orders in Council, P. C. 7355, 7356 and 7357, dated December 15, 1945, stated in their recitals to be made by the Governor in Council under the authority of the War Measures Act, R. S. C. 1927, c. 206, and which were continued in force by an Order in Council passed pursuant to s. 4 of the National Emergency Transitional Powers Act, 1945, provided in substance as follows:—Sub-sections 1, 2 and 3 of s. 2 of P. C. 7355, authorized the Minister of Labour to make orders respectively for deportation to Japan of the following persons, of sixteen years of age or over, who were resident in Canada and had made a request for repatriation: (1.) Every person, other than a Canadian national, who was a national of Japan; (2.) every naturalized British subject of the Japanese race, and (3.) natural-born British subjects of the Japanese race. By sub-s. 4 of s. 2 of P. C. 7355 "The wife and children under sixteen years of age of any "person for whom the Minister makes an order for deportation to Japan "may be included in such order and deported with such person."

P. C. 7356 provided that a British subject by naturalization who was deported under P. C. 7355 should, as from the date of deportation, cease to be either a British subject or a Canadian national. P. C. 7357 provided, inter alia, for the appointment of a Commission to make inquiry concerning the activities, loyalties and extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in cases where their names were referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case such persons should be deported:—

Held, that the three Orders in Council were in their entirety intra vires the Governor in Council. On its true construction the War Measures Act authorized the making of orders for deportation of any person, whatever his nationality, and the deprivation, so far as the law of Canada was concerned, of his status under that law as a British subject or Canadian national.

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* *Present:* VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

The Orders in question were "law" made by the Parliament of the Dominion at the date of their promulgation, which was after the passing of the Statute of Westminster, and accordingly the Colonial Laws Validity Act, 1865, afforded no ground for questioning the validity of the Orders in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, of the Imperial Parliament.

Lastly, with regard to sub-s. 4 of s. 2 of P. C. 7355, the substance of the matter had to be considered, and the power was not used for an unauthorized purpose when under sub-s. 4 an order was made for the deportation of the wives and children (under 16) of persons with respect to whom a deportation order had been made. Opinion of the Supreme Court of Canada [1946] S. C. R. (Can.) 248, affirmed.

Appeal (No. 58 of 1946) by special leave by the Co-operative Committee on Japanese Canadians and by the Attorney-General for Saskatchewan from the opinion certified by the Supreme Court of Canada (February 20, 1946), on a reference ordered by the Governor-General in Council under s. 55 of the Supreme Court Act, R. S. C. 1927, c. 35. The question referred for hearing and consideration was as follows:— "Are the Orders in Council, dated December 15, 1945, being "P.C. 7355, 7356 and 7357, ultra vires of the Governor in "Council either in whole or in part and, if so, in what par- "ticular or particulars and to what extent?"

The facts, the terms of the three Orders in Council and the provisions of the relevant statutory provisions set out below are taken from the judgment of the Judicial Committee.

The recitals to the Orders in Council which it was sought to impeach showed that they purported to have been made under the authority of the War Measures Act. That Act was first passed by the Parliament of Canada in 1914, and was now c. 206 of the R. S. C. 1927. Section 2 provided that the issue of a proclamation by His Majesty, or under the authority of the Governor in Council, should be conclusive evidence that war, invasion, or insurrection, real or apprehended, existed and of its continuance until by the issue of a further proclamation it was declared that war, invasion or insurrection no longer existed. The proclamation first called for by that section was duly made but no proclamation that the war no longer existed had been made. The relevant sections of that Act were as follow:—

"3. The Governor in Council may do and authorize such "acts and things, and make from time to time such orders "and regulations, as he may by reason of the existence of real "or apprehended war, invasion or insurrection, deem neces-

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"sary or advisable for the security, defence, peace, order and "welfare of Canada; and for greater certainty, but not so as to "restrict the generality of the foregoing terms, it is hereby "declared that the powers of the Governor in Council shall "extend to all matters coming within the classes of subjects "hereinafter enumerated, that is to say:—

"*(a)* Censorship and the control and suppression of publi- "cations, writings, maps, plans, photographs, communica- "tions and means of communication;

"*(b)* Arrest, detention, exclusion and deportation;

"*(c)* Control of the harbours, ports and territorial waters "of Canada and the movement of vessels;

"*(d)* Transportation by land, air, or water and the control "of the transport of persons and things;

"*(e)* Trading, exportation, importation, production and "manufacture;

1947 A.C. p. 90.

"*(f)* Appropriation, control, forfeiture and disposition of "property and of the use thereof.

"(2.) All orders and regulations made under this section "shall have the force of law . . . ."

"6. The provisions of the three sections last preceding "shall only be in force during war, invasion, or insurrection, "real or apprehended."

The three Orders in Council were all made on December 15, 1945. The preamble to the first Order (P.C. 7355) contained the following recitals:—"Whereas during the "course of the war with Japan certain Japanese Nationals "manifested their sympathy with or support of Japan by "making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have "requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be "made to deport the classes of persons referred to above;

"And whereas it is considered necessary . . . . for "the security, defence, peace, order and welfare of Canada, "that provision be made accordingly."

The first Order (s. 2, sub-ss. 1, 2, 3 and 4) then authorized the Minister of Labour to make orders for deportation "to "Japan" of the following persons.

(1.) Every person of sixteen years of age or over, other than a Canadian national, who was a national of Japan resident in Canada and who had since December 8, 1941 (the date of the declaration of war by the Dominion against Japan) made a request for repatriation or who had been detained under certain regulations and was so detained on September 1, 1945.

(2.) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who had made request for repatriation, provided that such request had not been revoked in writing before midnight on September 1, 1945.

(3.) Natural-born British subjects of the Japanese race of sixteen years of age or over resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for "deportation."

Sub-section 4 of s. 2 provided as follows:—"(4.) The wife "and children under sixteen years of age of any person for "whom the Minister makes an order for deportation to "Japan may be included in such order and deported with "such person."

The remaining provisions of that Order were of an ancillary or administrative nature.

The second Order (P.C. 7356) provided that any person being a British subject by naturalization under the Naturalization Act, c. 138, R.S.C. 1927, who was deported from Canada under the provisions of P.C. 7355, should as from the date on which he left Canada in the course of such deportation, cease to be either a British subject or a Canadian national. 1947 A.C. p. 91.

The third Order (P.C. 7357) provided for the appointment of a Commission to make inquiry concerning the activities, loyalties and extent of co-operation with the government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in cases where their names were referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission was also at the request of the Minister of Labour to inquire into the case of any naturalized British subject of the Japanese race who had

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made a request for repatriation, and make recommendations. It was then provided that any person of the Japanese race who was recommended by the Commission for deportation, should be deemed to be a person subject to deportation under the provisions of P.C. 7355, and as from the date on which he left Canada in the course of deportation, he should cease to be either a British subject or a Canadian national.

There was one further Act of the Parliament of the Dominion to which it was necessary to refer—the National Emergency Transitional Powers Act, 1945. That Act was assented to on December 18, 1945. It was to come into force on January 1, 1946, and on and after that day the war against Germany and Japan was for the purposes of the War Measures Act to be deemed no longer to exist. The Act was to continue in force until December 31, 1946, or, if Parliament were not then sitting, until a date determined by the sitting of Parliament. The Act recited the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor in Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it was essential that the Governor in Council be authorized to do and authorize such further acts, and make such further orders and regulations as he might deem necessary or advisable by reason of the emergency and for the purpose of discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency. By s. 2 of the Act the Governor in Council was given power to make orders and regulations as he might, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein. Those purposes did not include arrest, detention, deportation, or exclusion, but did include under sub-s. *(e)*:—"Continuing or discontinuing in an orderly manner, as "the emergency permits, measures adopted during and by "reason of the war." Sub-section 3 of s. 2 provided for every Order in Council passed under the Act being laid before Parliament and being annulled on resolution of the Senate

1947 A.C. p. 92.

or the House of Commons. Section 4 provided as follows:—"Without prejudice to any other power conferred by this Act, "the Governor in Council may order that the orders and "regulations lawfully made under the War Measures Act or "pursuant to authority created under the said Act in force "immediately before the day this Act comes into force shall, "while this Act is in force, continue in full force and effect "subject to amendment or revocation under this Act."

On December 28, 1945, the Governor in Council passed Order in Council P. C. 7414, pursuant to s. 4 of the National Emergency Transitional Powers Act, 1945, providing that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act, 1945, should come into force, should, while the latter Act was in force, continue in full force and effect subject to amendment or revocation under the latter Act. The result of that legislation was that the Orders in Council were now in force, if at all, by virtue of the Transitional Act.

In connexion with the question raised by this case, three Acts of the Imperial Parliament were relevant. The first of those was the Colonial Laws Validity Act, 1865. Sections 2 and 3 of that Act ran as follows:—"2. Any Colonial law "which is or shall be in any respect repugnant to the provi-"sions of any Act of Parliament extending to the Colony to "which such law may relate, or repugnant to any Order "or Regulation made under Authority of such Act of "Parliament, or having in the Colony the force and effect "of such Act, shall be read subject to such Act, Order, or "Regulation, and shall, to the extent of such repugnancy, "but not otherwise, be and remain absolutely void and "inoperative."

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"3. No Colonial law shall be or be deemed to have been "void or inoperative on the ground of repugnancy to the "law of England, unless the same shall be repugnant to the "provisions of some such Act of Parliament, Order or "Regulation as aforesaid."

The second was the Statute of Westminster, passed in the year 1931, which was duly adopted by the Parliament of Canada. Section 2 of that Act was in the following terms:—"2.—(1.) The Colonial Laws Validity Act, 1865, shall not

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"apply to any law made after the commencement of this "Act by the Parliament of a Dominion.

"(2.) No law and no provision of any law made after the "commencement of this Act by the Parliament of a Dominion "shall be void or inoperative on the ground that it is repug- "nant to the law of England, or to the provisions of any "existing or future Act of Parliament of the United Kingdom, "or to any order, rule or regulation made under any such Act, "and the powers of the Parliament of a Dominion shall "include the power to repeal or amend any such Act, order, "rule or regulation in so far as the same is part of the law of "the Dominion."

The third Act was the British Nationality and Status of Aliens Act, 1914. Part I of that Act related to "Natural- "born British Subjects." Part II related to the "Naturali- "zation of Aliens," and s. 9 provided that Part II. should not, nor should any certificate of naturalization granted there- under, have effect within any of the Dominions specified in the Schedule (which included Canada) unless the legislature of the Dominion adopted Part II. The Act of the Imperial Parliament was subsequently amended. The Parliament of Canada, by the Naturalization Act, 1914, did not in terms "adopt" the Imperial Act of 1914, but passed almost identical legislation. In 1915 the Parliament of Canada amended the Naturalization Act so as to introduce the amendments that had been made by the Parliament of Great Britain in Part II. of the British Nationality and Status of Aliens Act, 1914. That Act of 1915 contained a recital to the effect that the Dominion had adopted Part II of the British Act.

In the Supreme Court of Canada, in answer to the question submitted, Rinfret C.J., Kerwin and Taschereau JJ. gave the opinion that the Orders in Council in question were not ultra vires the Governor in Council either in whole or in part. Hudson and Estey JJ. were of the opinion that the Orders in Council were not ultra vires the Governor in Council, with the exception of sub-s. 4 of s. 2 of P.C. 7355. Rand J. was of the opinion that P.C. 7355 was not ultra vires the Governor in Council in relation to Japanese nationals and to persons of the Japanese race naturalized under the Naturalization Act of Canada, as well as to persons voluntarily leaving Canada, but was ultra vires in relation to the compulsory deportation of natural-born British subjects resident in Canada and of the

1947 A.C. p. 94.

wives and children under sixteen who did not come within the first two classes. Kellock J. was of the opinion that P.C. 7355 was not ultra vires, except sub-ss. 3 and 4 of s. 2. Rand and Kellock JJ. were also of the opinion that P. C. 7356 and 7357 were ultra vires in certain respects.

1946. July 16, 17, 18 and 19. *F. A. Brewin* (of the Canadian Bar) and *C. Shawcross* for the appellant the Co-operative Committee on Japanese Canadians. The unconditional surrender of the Japanese was in August, 1945, so that the Orders in Council of December, 1945, were made when the war was over. Four classes of persons are involved in P. C. 7355, and sub-s. 2 of s. 2 of that Order applies to naturalized British subjects under whatever Act they were naturalized, whether Imperial or the Act of another Dominion, in contrast with P. C. 7356, where the Naturalization Act of Canada is expressly mentioned. There is no definition of "person of the Japanese race." No orders of deportation have yet been made. The appellants object to the validity of deportation "to Japan" as not being authorized by the War Measures Act, 1914; the Parliament of Canada did not by the terms of that Act delegate to the Governor in Council the power to make orders providing for the exile, to Japan, of British subjects whether by birth or naturalization, resident in Canada, as provided by P. C. 7355 and 7357. [The War Measures Act, 1914, now R. S. C. 1927, c. 206, and the National Emergency Transitional Powers Act, 1945, under which the Orders, if valid, now take effect, were referred to.]

The Orders in Council, made under the War Measures Act of 1914, are repugnant to the Imperial British Nationality and Status of Aliens Act, 1914, which was adopted by, and extends to, the Dominion of Canada. The Colonial Laws Validity Act, 1865, therefore applies. Parliament could not enact the Orders until after the Statute of Westminster, 1931; regulations made under a previous Act are not enough. In the general language of the War Measures Act must be read, at least before the Statute of Westminster, an implied limitation that it did not authorize the Governor in Council to do something it could not do, namely, to make a regulation or order inconsistent with an Imperial statute. [Reference was made to *Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an*

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Order of the Controller of Chemicals made pursuant thereto (1), and to *Macleod* v. *Attorney-General for New South Wales* (2).] If my argument is right, that before 1931 the Parliament of Canada itself could not even in express terms pass an Act repugnant to the British Nationality and Status of Aliens Act, then the general language of the War Measures Act must be read subject to that limitation. The Statute of Westminster has not affected or changed the proper interpretation of statutes passed before it came into force. In other words, if there was a statute such as the War Measures Act in force before the Statute of Westminster, which had on a proper interpretation certain implied limitations or conditions, there was nothing in the Statute of Westminster to say that it should be interpreted in a different sense.

The next point is that Parliament did not, on the proper construction of the War Measures Act, delegate to the Governor in Council the authority to remove forcibly to Japan British subjects resident in Canada. If correct, that submission applies to "natural-born British subjects" (sub-s. 3 of s. 2 of P.C. 7355), "naturalized British subjects" of the Japanese race (sub-s. 2 of s. 2) and also covers the wives and children (sub-s. 4 of s. 2). The only case in which the function of the enumerated heads of s. 3 of the War Measures Act was referred to was *Re Gray* (3). All those enumerations would be quite unnecessary if the opening general words were so broad as to permit anything at all to be done. It is submitted that where Parliament has said, using the language in *Gray's* case (3), that the powers of the Governor in Council can go even as far as the forcible removal of aliens as a preventative war time measure, then the expulsion of British subjects to a country from which they have not come is going beyond the margin, and is a matter on which there is an unresolved doubt. [Reference was made to Maxwell on the Interpretation of Statutes, 8th ed., p. 130.] Even general words should not be interpreted as being intended to be anything repugnant to international law or the comity of nations unless it is clear that they be so. It is purely a rule of construction which, it is submitted, applied in this case both to the meaning of the word "deportation" and to the general words with which the section opens: The *Le Louis* (4);

1947 A.C. p. 96.

(1) [1943] S. C. R. (Can.) 1, 10.
(2) [1891] A. C. 455.
(3) (1918) 57 S. C. R. (Can.) 150, 177.
(4) (1817) 2 Dodson 210, 239.

Croft v. *Dunphy* (1). The comity of nations recognizes the right to deport aliens, but by clear implication it does not recognize the right to force a country to accept nationals of another country, and in the present case the receiving country is not the place of origin: Oppenheim's International Law, 4th ed., vol. I., pp. 560, 562; Wheaton's International Law, 6th ed., pp. 210-11; Hall's International Law, 6th ed., vol. I., p. 493; and *Attorney-General for Canada* v. *Cain* (2). On the meaning of "deportation" see Webster's Dictionary. Reliance is also placed on the fact that in a whole series of Canadian Acts, beginning with the Immigration Act, R.S.C. 1927, c. 93, there is a statutory definition given to the word "deportation" which is not broad enough to cover what is proposed to be done here. [Reference was also made to *Shin Shim* v. *The King* (3).] Further, the Imperial Aliens Act, passed a few days before the Canadian Act, provides for the deportation of aliens only. On the question of construction I call in aid the well known principle that statutes which invade the liberty of the subject should be expressed in clear and unambiguous language. It is conceded that that general rule must give way to the pressing purposes of war: *Liversidge* v. *Sir John Anderson* (4). but where there is an ambiguous word like "deportation" very different considerations apply.

These Orders in Council constitute an interference with "property and civil rights," a field assigned exclusively to the Provincial legislature under head 13 of s. 92 of the British North America Act, 1867. After January 1, 1946, no such emergency existed as justified such an interference as we have here with the normal constitutional structure, and to the extent that s. 4 of the National Emergency Transitional Powers Act, 1945, purports to authorize the Governor in Council to carry out something not already begun it is ultra vires. It is conceded that on the authority of *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (5), the Provincial power under "property and civil rights" could be overriden while an emergency lasts, but even during the war it could only be overriden to the extent that it was related to the emergency. Legislation of the Dominion interfering with the normal constitutional structure in relation to

1947 A.C. p. 97.

(1) [1933] A. C. 156, 177-8.
(2) [1906] A. C. 542, 545.
(3) S. C. R. 57 (Can.) 378.
(4) [1942] A. C. 206.
(5) [1923] A. C. 695.

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property and civil rights and not connected with post-war necessity is invalid: *In re Price Bros. & Company and the Board of Commerce of Canada* (1), where the difference between the war and post-war situation is pointed out.

The next point is that if these Orders in Council which, it is contended, are all part of one scheme, are invalid, they are not severable, and must all fall together. In other words, if the argument that P. C. 7356 and 7357 are invalid is correct, then they are such an essential part of the scheme that the rest of the Orders cannot stand. The court cannot presume that the Governor in Council would have seen fit to carry out the truncated orders and to give validity to what is left: *In re the Validity of Manitoba Act* (2), and on appeal, sub nom. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3).

The last matter is in relation to the question of loss of nationality; that loss is not effectively achieved by these orders for deportation because the loss of status as a British subject is necessarily incidental to effective legislation in relation to deportation. The Orders in Council empowering orders to be made for the deportation of persons "of the "Japanese race" are so vague that they are incapable of application to ascertained persons and are therefore inoperative and invalid, and do not constitute orders or regulations such as the Governor in Council is empowered to make under the provisions of the War Measures Act.

F. A. Brewin and *G. Wilson* (of the Canadian Bar) for the appellant the Attorney-General for Saskatchewan associated themselves with the submissions made on behalf of the Co-operative Committee on Japanese Canadians, and contended that the proper answer to the question referred should have been that the impugned Orders in Council were in their entirety ultra vires the Governor in Council.

H. E. O'Donnell K.C. (of the Canadian Bar), *Gahan* and *W. R. Jackett* (of the Canadian Bar) for the respondent the Attorney-General for Canada. With regard to the right to deport British subjects, and whether "deportation" is wide enough to include them, the widest possible powers were deemed to be necessary for the Governor in Council in 1939

1947 A.C. p. 98.

(1) (1920) 60 S. C. R. (Can.) 265, 279.

(2) [1924] S. C. R. (Can.) 317, 323.

(3) [1925] A. C. 561, 568.

as in 1914, when the War Measures Act was passed. The words "deportation" and "exclusion" in the War Measures Act include the power to remove from Canada all those mentioned in the Orders in question. The opening words of s. 3 of that Act, giving plenary authority to the Governor in Council, and the statement that the enumeration which follows shall not restrict the generality of the opening words, are sufficient to give the Governor in Council the necessary powers to pass the Orders even if that power were not included in the words "exclusion" and "deportation." The language of s. 3 is to be given its natural effect; the words are very broad and general: *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). The Governor in Council was entitled to consider whether a person might be deported, British subject, alien or anyone who was within the contemplation of Parliament as the Act indicates without distinction. On the interpretation the appellants seek of the word "deportation" two words have to be read into the section, "of aliens." [Reference was made to the definition of "deportation" in the Oxford English Dictionary, to *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)* (2), and to the Immigration Act, R. S. C. 1927, c. 93, s. 2 *(c)*.] "Deportation" in s. 3 of the War Measures Act is unqualified and is broad enough to cover all classes of persons, and the general power is not in any way cut down by the specific enumeration in s. 3: *Re Gray* (3).

Gahan followed. These three Orders in Council are laws made by the Parliament in Canada, and they are laws made after the passing of the Statute of Westminster. "Laws" as used in that Act include laws, orders or regulations pursuant to delegated authority. It is said for the appellants, however, that the authority under which the Orders in Council were made—the War Measures Act—was long antecedent to the Statute of Westminster. It is submitted that it follows as a logical necessity that if the date of the making of the law is after the passing of the Statute of Westminster, the law is one of the Parliament of Canada, and notwithstanding the fact that the authority for making the law is antecedent, the law itself is intra vires. For the Colonial Laws Validity Act, 1865, to have any bearing on this matter the appellants must show an Act of the Imperial

(1) [1943] A. C. 356, 370.
(2) [1931] A. C. 662.
(3) 57 S. C. R. (Can.) 150.

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Parliament which by express words or necessary intendment applies to Canada and a law of the Canadian Parliament which is repugnant to the Imperial Act. They purport to find that Imperial legislation in the British Nationality and Status of Aliens Act, which, they say, was adopted by Canada, and that therefore it is an Act which extends to Canada to which the Orders in Council are repugnant. The key to the position is that the word "adopted" can be used in two different senses. When in the Imperial Act Parliament speaks of "adopting" this Act, it means taking such action as would make the Imperial Act part of the law of Canada so that it is that Act which operates in Canada. "Adoption" may be used in quite a different sense, however; for instance, there are bodies in Canada for promoting uniformity of law in the Provinces, and one Province in that sense adopts the laws of the other; but none of those adoptions mean that the legislation of the one Province is operative in the other, and it is submitted that the Canadian Parliament was very deliberately refraining from making the English law operative in Canada, although it was carefully providing that under its own rule the same result would be produced. The British Nationality and Status of Aliens Act is not an Act which extends to Canada unless Canada adopts the Act. That must be done directly by the Parliament of Canada. In the Imperial Act there is a provision that that Act and the certificate of naturalization granted should have no effect in any of the self-governing Dominions unless the Dominion adopted it. Canada was not adopting the Act in that sense; it was passing parallel legislation, and therefore the position is that under s. 9 of the Imperial Act a certificate of the Secretary of State granted to an alien in England, who then went to Canada, would have no effect in Canada because Canada was not adopting the Act. Canada, wishing to approve of the scheme of the British legislation, has in fact enacted that within the bounds of Canada a certificate granted by the British shall have the same force as if the Canadian Minister had himself granted a Canadian certificate. The test is, what the Parliament of Canada did; the Imperial Act was not adopted in Canada, and by express terms it was not extended. If, therefore, the Imperial Act has not been adopted, the question of repugnancy does not arise.

It is submitted that the view of Rinfret C.J. and the two judges who concurred with him is right, and that the three Orders in Council are in their entirety valid. With regard to severance, in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1) and *Insurance Act of Canada, In re* (2) there was a series of enactments which could be separated, while here there is only the one question. This is not a case where the women and children have to be deported, it is a discretion given to the Minister. If the other parts are valid, the provision that in suitable cases the wives and children should be deported is ancillary and should be held valid.

Gordon Wismer K.C. (of the Canadian Bar) and *Crispin* for the respondent the Attorney-General for British Columbia, supported and adopted the argument for the Attorney-General for Canada. As to severability, it was suggested for the appellants that the Order taking away nationality and changing the status was ultra vires, and that therefore the whole Order would be bad. It is submitted that the Order, if invalid, is severable, and that the orders could be carried into effect even if it is found that one class cannot be included: *Attorney-General for Canada* v. *Attorney-General for Ontario* (3). In any event, it is contended that these Orders in Council refer to persons who have no other racial origin than Japanese.

F. A. Brewin replied. If the Parliament of Canada is not to be taken by the course of what was done to have adopted the British Nationality and Status of Aliens Act, then certificates of nationalization granted by the Canadian authority have not got Imperial validity, and the holders are aliens within the rest of the Commonwealth and the United Kingdom—a sweeping effect. By their own recital the Parliament of Canada has adopted the Imperial Act. [Reference was made to *British Coal Corporation* v. *The King* (4) and *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*) (5).]

December 2. LORD WRIGHT, delivering the judgment of the Board, stated the terms of the Orders in Council and the provisions of the relevant legislation as set out above, and

(1) [1937] A.C. 405, 409.
(2) [1932] A.C. 41.
(3) [1937] A.C. 355.
(4) [1935] A.C. 500, 507.
(5) [1931] A.C. 494, 503.

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said that it was convenient first to deal with the question raised as to the effect of the Naturalization legislation of the Dominion on the topic of the adoption of the British Nationality and Status of Aliens Act. His Lordship continued: The contention of the appellants was that the Parliament of Canada did "adopt" Part II of the Imperial Act in the sense in which that word was used in the Imperial Act, and that in consequence Part II formed part of the law of the United Kingdom extending to the Dominion. The contention of the respondents was that the Canadian Statutes are only parallel legislation. In arriving at a conclusion as to the advice their Lordships think it right to tender to His Majesty they find it unnecessary to express an opinion as to the correctness or otherwise of the contention of the appellants. Their Lordships will assume that the appellants are right in their contention, but they do not express any opinion one way or another on it.

There was a considerable diversity of opinion between the members of the Supreme Court on some of the points which fell for decision under the reference. In one important respect at least—the invalidity of sub s. 4 of s. 2 of P.C. 7355—the views of the majority of the Court were adverse to the respondents. No cross-appeal was lodged. This in the circumstances was only the absence of a formality. A determination on the legal effect of the orders as a whole is necessary to arrive at a conclusion on the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety. Their Lordships now turn to the question at issue. On certain general matters of principle there is not, since the decision in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1), any room for dispute. Under the British North America Act property and civil rights in the several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What

(1) [1923] A.C. 695.

those interests are the Parliament of the Dominion must be left with considerable freedom to judge. Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers. Lastly, it should be observed that the judiciary are not concerned when considering a question of ultra vires with the question whether the executive will in fact be able to carry into effective operation the emergency provisions which the Parliament of the Dominion either directly or indirectly has made. It is unnecessary, therefore, for their Lordships to take into review or even to recount the particular circumstances obtaining within the Dominion that led to the Orders in question or the arrangements made with a view to their execution.

The validity of the War Measures Act was not attacked before their Lordships, and, consistently with the principles stated, was not open to attack. The validity of the orders was challenged on many grounds. Their Lordships have considered not only the points put forward on behalf of the appellants, but whether the orders were susceptible of criticism for reasons not put forward. Their Lordships are satisfied that all possible grounds of criticism were in one form or another included in the grounds on which the appellants relied. For the validity of the orders it is necessary first, that on the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor in Council, second, that, assuming the orders were within the terms of the War Measures Act, they were not for some reason in

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law invalid. The points taken were, first, that the War Measures Act did not on its true construction authorize orders for deportation to be made as respects British subjects or Canadian nationals, and that it should in certain respects receive a limited construction: second, that if the Act purported on its construction to authorize the making of such orders, yet the orders made would be contrary to the Imperial Statute, British Nationality and Status of Aliens Act, and therefore to that extent invalid: third, that the provision contained in s. 2, sub-s. 4, of P.C. 7355 (relating to the wives and children of persons in respect of whom an order for deportation had been made) was for a specific reason invalid: fourth, that in any event the order made under the National Emergency Transitional Powers Act continuing the former orders of the Governor in Council was invalid.

The first point raises questions of construction with which their Lordships must now deal. The language of the War Measures Act is in general terms, but it was argued that certain limitations were as a matter of construction of the Act to be implied and that to the extent to which any order purporting to be made under the Act fell outside its proper ambit, the order would of necessity be invalid. The first suggested limitation was based on the Colonial Laws Validity Act, 1865. At the date when the War Measures Act came into force legislation made by the Parliament was in its effect subject to the provisions as to repugnancy contained in the Act of 1865, and it was argued that the War Measures Act should be construed as confined in its possible ambit to the making of orders which would, consistently with the Colonial Laws Validity Act, 1865, then be valid as law within the Dominion. If that was so the orders were not authorized by the War Measures Act in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, which was an Act of the Imperial Parliament and in the appellants' contention extended to the Dominion as part of the law of the United Kingdom. Their Lordships are unable to accept this contention. The effect of the Colonial Laws Validity Act, 1865, was only that Canadian legislation repugnant to the statutory law of the United Kingdom applying to the Dominion was inoperative. The only conclusion to be drawn from a consideration of the Colonial Laws Validity

Act is that the War Measures Act did not on its true construction confer a power beyond the extent to which it might at the date of its use be validly exercised. The statutory law of the United Kingdom is not static and, in their Lordships' opinion, there is no justification for the imputation that the Parliament of Canada legislated on the footing that it is static. The effectiveness of legislation of the Parliament of the Dominion at the date when those delegated powers are exercised, not the limitation on that legislation at the date when the War Measure Act was passed, is, so far as the Act of 1865 is concerned, the relevant matter.

Secondly, it was argued that, as a matter of construction, the War Measures Act did not authorize the making of orders having an extra-territorial operation. This point was relevant by reason that the orders in question in terms authorized "deportation." This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (*Attorney-General for Canada* v. *Cain* (1)), and was, therefore, in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added, set at rest by the Canadian Statute, the Extra-Territorial Act, 1933.

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Thirdly, it was argued that the War Measures Act should be construed as authorizing only such orders as are consistent with the accepted principles of international law, and that the forcible removal to a foreign country of British subjects was contrary to the accepted rules of international law. The Act therefore as a matter of construction did not, it was said, purport to authorize orders providing for such removal. It may be true that in construing legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law (cf. *Croft* v. *Dunphy* (2)), but the nature of the legislation in any particular case has to be considered in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor in Council of powers vested

(1) [1906] A.C. 542. (2) [1933] A.C. 156.

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in the Parliament of the Dominion at a time when war, invasion, or insurrection or their apprehension exists. The accepted rules of international law applicable in times of peace can hardly have been in contemplation, and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.

The next question of construction arising under the Act has more substance. It was said that there was inherent in the word "deportation" as part of its meaning the necessity that the person to be deported was—as respects the State exercising the power—an alien. The express power given to expel persons from Canada was therefore limited to aliens, i.e., persons who were not Canadian nationals. It was not permissible to treat as authorized by the general power a power to make orders for deportation in relation to a class of persons impliedly excluded from deportation by the terms of the specific power. There was therefore an implied prohibition against the deportation of Canadian nationals. On this argument it may be conceded that commonly it is only aliens who are made liable to deportation, and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration. The dictionaries, as might be expected, do not altogether agree as to the meaning of deportation, but the Oxford English Dictionary gives as its definition "The action of carrying away: "forcible removal, especially into exile: transportation." As a matter of language, their Lordships take the view that "deportation" is not a word which is misused when applied to persons not aliens. Whether or not the word "deportation" is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found. In the present case the Act is directed to dealing with emergencies; throughout it is in sweeping terms, and the word is found in the combination "arrest, detention, exclusion and deportation." As regards the first three of these words, nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found, establish, in their Lordships' view, that in this statute the word "deportation" is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction

1947 A.C. p. 105.

of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian nationals. Nationality per se is not a relevant consideration. An order relating to deportation would not be unauthorized by reason that it related to Canadian nationals or British subjects. Even if this were not the case, the same result may be reached by another route. The general power given to the Governor in Council in the opening part of s. 3 of the Act is not in this statute limited by reference to the acts particularly enumerated, and their Lordships see no reason for differing from the view expressed by Rinfret C.J. that the order was justifiable under that general power (see *King-Emperor* v. *Sibnath Banerji* (1)).

There remains one further question of construction of The War Measures Act, namely, whether it authorized the making of an order which provided that deported persons should cease to be either British subjects or Canadian nationals. That matter must be considered in the light of views which their Lordships have already expressed as to the construction of the Act. They see no reason for excluding from the scope of the matters covered by the general power contained in s. 3 a power to take from persons who have in fact under an order for deportation left Canada their status under the law of Canada as British subjects and Canadian nationals.

1947 A.C. p. 106.

The result is that on its true construction the War Measures Act authorized the making of orders for deportation of any person whatever be his nationality, and the deprivation, so far as the law of Canada was concerned, of his status under that law as a British subject or Canadian national.

The next question is whether The Colonial Laws Validity Act, 1865, applies to the orders of the Governor in Council. If it does, then in so far as they are repugnant to the British Nationality and Status of Aliens Act (which their Lordships are assuming to be an Act of the Imperial Parliament extending to Canada) they are invalid unless the provisions of the Statute of Westminster can be relied on. The contention of the appellants was that the orders, though law made after the date of the Statute of Westminster, were not

(1) (1945) L.R. 72 I.A. 241.

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law made after that date by the Parliament of the Dominion. The activities of Parliament in the matter in question had, it was said, ceased in 1927. The orders were not of its making. The passing by the Parliament of the National Emergency Transitional Powers Act, 1945, was, for the purpose in hand, immaterial, for the reason that s. 4 empowered the Governor in Council to order the continuance only of orders and regulations "lawfully" made under the War Measures Act. Their Lordships agree that in considering this particular matter the National Emergency Transitional Powers Act, 1945, cannot be prayed in aid of the validity of the orders, but in their opinion the orders in question were made "after the passing of this Act [i.e., "the Statute of Westminster] by the Parliament of the "Dominion" as that phrase is used in the Statute of Westminster. This, again, is a question of construction. Both in sub-ss. 1 and 2 of s. 2 of the Statute of Westminster the matter which is dealt with is "law," and that is a general term which includes not only statutes but also orders and regulations made under statutes. Undoubtedly, the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised. Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor in Council has no independent status as a law-making body. The legislative activity of Parliament is still present at the time when the orders are made, and these orders are "law." In their Lordships' opinion they are law made by the Parliament at the date of their promulgation. A contrary conclusion would, in their Lordships' view, place an artificial and narrow construction on wide terms used in an Act of Parliament the subject-matter of which demands that a liberal construction should be put on the language used. In the result, therefore, the Colonial Laws Validity Act, 1865, affords no ground for questioning the validity of the orders.

1947 A.C. p. 107.

The next matter arises on sub-s. (4) of s. 2 of P.C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of sixteen years) of persons with respect to whom an order

for deportation has been made. The case sought to be made runs as follows: The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-ss. 1, 2 and 3 of s. 2 of the order. In the case of the classes of persons referred to in sub-ss 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary; a request was considered by the Governor in Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-s. 4, and the only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order, therefore, not only does not show that by reason of the existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might, indeed, be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration. The incompleteness of the recital is, in their Lordships' view, of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorized purpose would be invalid, and the only question is whether there is apparent any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorized purpose. In their Lordships' opinion there is not. The first three sub-sections of s. 2 no doubt deal with the matter which primarily engaged the attention of the Governor in Council, but it is not in their Lordships' view a proper inference from the terms of those subsections that the Governor in Council did not also deem it necessary or advisable for the security, defence, peace, order and welfare of Canada that the wives and children under sixteen of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or

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father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go.

The last matter of substance arises on the National Emergency Transitional Powers Act, 1946. It was contended by the appellants that at the date of the passing of this Act there did not exist any such emergency as justified the Parliament of Canada in empowering the Governor in Council to continue the orders in question. The emergency which had dictated their making—namely, active hostilities—had come to an end. A new emergency justifying exceptional measures may, indeed, have arisen, but it was by no means the case that measures taken to deal with the emergency which led to the Proclamation bringing the War Measures Act into force were demanded by the emergency which faced the Parliament of Canada when passing the Transitional Act. The order under the Act continuing the orders in question was therefore prima facie invalid. This contention found no favour in the Supreme Court of Canada, and their Lordships do not accept it. The preamble to the Transitional Act states clearly the view of the Parliament of the Dominion as to the necessity of imposing the powers which were exercised. The argument under consideration invites their Lordships, on speculative grounds alone, to overrule either the considered decision of Parliament to confer the powers or the decision of the Governor in Council to exercise them. So to do would be contrary to the principles laid down in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1) and accepted by their Lordships earlier in this opinion.

One remaining matter relied on by the appellants should be mentioned. First it was said that the words "of the "Japanese race" were so vague as to be incapable of application to ascertained persons. It is sufficient to say that in their Lordships' opinion they are not. All that can be said is that questions may arise as to the true construction of the phrase and as to its applicability to any particular person, but difficulties of construction do not affect the validity of the Orders.

1947 A.C. p. 109.

(1) [1923] A.C. 695.

In the result, their Lordships find themselves in agreement with the conclusion at which Rinfret C.J. and Kerwin and Taschereau JJ. arrived, and for the reasons they have expressed will humbly advise His Majesty that none of the Orders in Council is in any respect ultra vires and that the appeal should be dismissed. There will be no order as to costs.

Solicitors for both appellants: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia: *Gard, Lyell & Co.*

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P.C.

MONTREAL v. MONTREAL LOCOMOTIVE WORKS LTD. et al.

Judicial Committee of the Privy Council, VISCOUNT SIMON, LORDS WRIGHT, PORTER and UTHWATT and SIR LYMAN POOR DUFF.
October 24, 1946.

Taxes I C—Crown III A—Property and business taxes—Company occupying Crown property and operating Crown plant—Whether agent of Crown—Construction of contracts with Crown—

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1 D.L.R.
p. 161.

A commercial corporation sold its property to the Crown (Dominion) under a contract by which it agreed to construct thereon, at the expense and subject to the direction and control of the Crown, a new plant for the production of war material, the title to be in the Crown, and provision was made for possible repurchase by the corporation of its property. By a further contract the corporation agreed to manage and operate the plant for a fee in respect of each item produced, provision being made whereby the corporation in incurring costs and expenses in carrying out its duties would not have to resort to its own funds. In each contract the corporation's obligations were referred to as "for and on behalf of the Government and as its agent". *Held,* on a proper construction of the contracts (under which it appeared that all land, plant and materials involved in the operation of the factory belonged to the Crown and that the corporation took no risk of loss and was under no liability save for bad faith or wanton neglect, and that the fees it received were for management services), the corporation was an agent of the Crown rather than an independent contractor, and hence was not assessable either for occupant or business taxes under arts. 362a and 363 of the *Montreal Charter. Held,* further, although the deed of the property sold to the Crown was not executed until February 27, 1942, the corporation was not liable for property tax, under art. 361 of the Charter, for the period from November 1, 1941 to April 30, 1942, since in view of the contract of sale to the Crown, entered into on October 23, 1940, the property had become vested in the Crown on or before November 1, 1941.

Cases Judicially Noted: *Dixon* v. *London Small Arms Co.,* 1 App. Cas. 632, consd.

Statutes Considered: *Montreal Charter,* 1899 (Que.), c. 58 arts. 361, 362a, 363.

EDITORIAL NOTE: When the Judicial Committee speaks of the land sold to the Crown as having become *vested* in the Crown by virtue of the contract of sale and prior to any deed of conveyance, it was obviously referring to the beneficial interest and was inferentially saying that the taxing measure (art. 361) made the beneficial owner and not the bare legal owner liable.

APPEAL from a judgment of the Supreme Court of Canada, [1945] 4 D.L.R. 225, reversing a judgment of the Quebec Court of King's Bench, Appeal Side, [1945] 2 D.L.R. 373, which had affirmed a judgment of Bond C.J.S.C., [1944] 1 D.L.R. 173, and holding respondent corporation not liable for certain municipal taxes. Affirmed.

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G. St. Pierre K.C. and *Mr. McKenna,* for appellant; *L. A. Forsyth* K.C., *Frank Gahan* and *W. R. Jackett* K.C., for respondents.

The judgment of their Lordships was delivered by

LORD WRIGHT:—This is an appeal from an unanimous judgment of the Supreme Court of Canada, [[1945], 4 D.L.R. 225, S.C.R. 621] reversing a judgment of the King's Bench of Quebec [[1945] 2 D.L.R. 373] which had decided in favour of the appellant by a majority of three to two and affirmed the judgment of the trial Judge, Bond C.J.S.C. [[1944] 1 D.L.R. 173].

The question at issue was whether the appellant, the City of Montreal, was entitled to recover from the respondent company certain taxes which it claimed to levy under the City Charter and by-laws. The trial proceeded upon an agreed submission by the parties under art. 509 of the Quebec *Code of Civil Procedure.*

The respondent company is incorporated under the law of Canada and carries on business at Montreal. On October 23 1940, it entered into two contracts with the Canadian Government represented by the Minister of Munitions and Supply of Canada, with a view to the production of tanks and gun carriages. One of these contracts was called the construction contract and was for the designing, construction and equipment of new plant upon land to be sold by the respondent to the Government for the production of the tanks and gun carriages provided for by the other contract which was called the production contract. In the former contract the respondent undertook the designing, construction and equipment of the new plant "for and on behalf of the Government and as its agent" and in the latter contract it was agreed that the respondent should operate the new plant for the production of the tanks and gun carriages "for and on behalf of the Government and as its agent". The new plant was duly constructed upon a piece of the respondent's land which was sold to the Government. The respondent then proceeded to operate the new plant as stipulated by the agreement. The issue is whether the appellant is entitled to levy certain municipal taxes on the respondent. These fall into two main heads (1) the tax on immovable property in regard to the piece of land sold by the respondent to the Government; (2) the "business" tax in regard to the construction of tanks and gun carriages carried on upon it. The claims were under each head in respect of two periods (*a*) from November 1, 1941, to April 30, 1942; (*b*) from May 1, 1942, to April 30,

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1943. The substantial issue can be stated with sufficient accuracy for the moment to have been whether the respondent company was in occupation of the premises so as to be taxable as such in the material periods. That issue again depended on whether during these periods it was operating merely as a manager or agent of the Government or whether it was carrying on business on its own behalf as a principal selling or delivering the tanks and gun carriages to the Government when it had made them according to the specifications prescribed by the Government. In the former event, the relation under the contract would be one of mandate and the respondent company would not be on the premises in its own right and would not be liable to the tax as occupant. The occupant would in that event be the Government as the respondent's principal or superior and in virtue of s. 125 of the *B.N.A. Act* would be immune from taxation. On the other view the respondent would be subject to the taxes as occupant. The two contracts as already stated expressly declare that the respondent was under them acting as agent for and on behalf of the Crown. But these declarations are not conclusive. The question must be decided on a consideration of the terms of the carefully prepared contracts. Their Lordships will reserve at this stage any examination of a separate point which is raised with regard to the property tax in respect of the first period in question, that between November 1, 1941, and April 30, 1942, that is, after the beneficial ownership in the piece of land and the buildings upon it was transferred from the respondent to the Government but before it had been formally transferred.

The Government, the second respondent in this appeal, has intervened in the proceedings on the footing that even if it was merely the principal or superior of the respondent in these matters it might have to idemnify the respondent in respect of any taxes which the respondent was held bound to pay as a result of the action.

The taxes in question were municipal taxes imposed by the appellant under its Charter and by-laws.

Article 1 (*h*) of the City Charter defines the word occupant as meaning any person who occupies an immovable in his own name otherwise than as proprietor, usufructuary or institute and who enjoys the revenues derived from such immovable.

Article 361 is the general provision declaring that all immovable property situate within the limits of the city shall be liable to taxation with the exceptions thereafter stated. Then s-s. (6) of the article provides that the city may make by-laws to impose and levy annually on taxable immovable property in the city, taking into account any special or general real estate tax, an assessment not exceeding two per cent. of the value of the said immovables, as entered on the valuation roll in force at the time of the imposition. The assessment, it provides, shall be a charge upon such immovables and the owners thereof shall be personally liable therefor. This is the "property" tax which is one of the impositions claimed by the city in this case. Article 362 sets out a list of exemptions none of which are here relevant. The overriding exemption of the Crown under the *B.N.A. Act* is not specifically repeated; article 362a however contains the following special provision: "The exemptions enacted by article 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty or to the Federal and Provincial Governments, or to the Board of Harbour Commissioners who shall be taxed as if they were the actual owners of such immoveables and shall be held to pay the annual and special assessments, the taxes and other municipal dues." The next two paragraphs provide that if an occupant whose name appears on the valuation roll quits before May 1st the premises leased, he shall not be held to pay the taxes imposed for the year beginning on May 1st. The 1st May was the beginning of the fiscal year. The next paragraph of the article provides for entering on the roll the name of a person who occupies for the purposes mentioned in the article the immovable either on May 1st or on another date during the fiscal year.

Article 363 imposes the other tax which has to be considered in this case; that tax is called the "business" tax and it is to be levied on all trades, manufactures, financial or commercial institutions, premises occupied as warehouses or storehouses, occupations, arts, professions or means of profit or livelihood carried on or exercised by any person or persons in the city not exceeding ten per cent. of the annual value of the premises in which such trades, financial or commercial institutions, occupations, arts,

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professions or means of profit or livelihood are respectively exercised or carried on. The main issue in this appeal is whether the respondent is liable as a firm exercising or carrying on the business which is the subject of taxation, that is whether it carried on the business on its own behalf, and is not merely the agent or mandatory of a principal who in this case would be the Crown.

The by-laws go on to provide in detail for the administration of the taxes, and in particular by art. 375 (*a*) (*b*) for transfers and changes of ownership.

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The taxes are annual taxes and are imposed each year by by-laws for that year. The relevant by-laws for the years in question are duly exhibited in the case.

In accordance with the construction agreement the buildings specified were completed and were ready to be occupied on November 1, 1941. The real estate assessment had been made before then on the respondent. When the appellant claimed to continue the tax as on an increased value charging the respondent as owner for the period from November 1, 1941, to April 30, 1942, by a bill specifying the respondent as the owner, the respondent by letter of his solicitors dated November 28, 1941, protested that the land and buildings were the property of the Government and though the land was still registered in the name of the respondent it was under promise of sale to the Government and would be conveyed to the latter by deed within a few days. By a letter dated December 1, 1941, the Government repeated this information, giving also details of the contracts between the respondent and the Government. The deed of sale was not registered until February 28, 1942, but the property passed under the contract to the Government on or before November 1, 1941. The appellant however claimed to tax the respondent as owner and maintained that claim in the present action, and in addition, though the appellant was notified that the respondent was operating as manager for the Government under the production agreement, the respondent was assessed for the business tax. In the assessment for the following year, May 1, 1942, until April 30, 1943, the respondent was entered as occupant of the new building, motive power and land in the real estate assessment and was also charged with the business

tax with respect to the same building. It is with the validity of these assessments that the present suit is concerned.

It is clear that all the assessments must be set aside if the respondent cannot be held occupant during the period in question. The special question which has been raised in connection with the assessment for the first period which was expressed to be on the respondent as owner may be referred to later but cannot affect the issue if the appellant fails to establish that the respondent was the occupant at the material periods. To decide this crucial question their Lordships must examine in a little more detail the contracts between the parties. The two agreements are long and complicated. It is unnecessary to state their terms in full. All that is attempted here is a summary of the most salient provisions which seem to bear on the material issues. Here it is also enough simply to note that the American Locomotive Co. was a party to each agreement in order to co-operate with and assist the respondent.

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The construction agreement included an agreement for the sale by the respondent to the Government of the site on which the new plant was to be erected according to designs prepared by the respondent. The respondent was to have full control over the design, construction and equipment of the new plant and all incidental matters, but subject to such supervision, direction and control as the Government might desire to exercise. There were elaborate financial conditions, but in effect the total cost was to be provided by the Government and banking arrangements were to be made to enable the respondent to meet all expenses without resorting to its own funds. For this purpose a "special account" was to be established with the Royal Bank of Canada and replenished month by month, with a provision for additional credit when necessary. The respondent was to act throughout and be recognized as acting as agent for the Government and was to be indemnified accordingly in every respect "except in cases of definite bad faith or wilful neglect on the part of the respondent" and was to be entitled to charge all overhead and other expenses. Title in all the new plant, equipment and accessories was to be vested in the Crown. The Government was to be entitled to cancel the agreement, subject to various conditions for settling outstanding matters.

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There were elaborate provisions for the disposal of the plant, machinery and site at the termination of the contract. In the event of the Government selling the site, plant, etc., the Government was entitled to realize its full value: in the event, however, of the site being cleared of the plant and machinery, it was to be resold to the respondent for the original price of one dollar, which was the consideration stipulated in the deed of sale dated February 27, 1942, transferring the property to the Government. The property in the site vested in the Government at some date earlier than November 1, 1941.

The production contract was also a very complicated document. The respondent therein agreed to operate the plant referred to above for the production of gun carriages and tanks for the Government at a certain rate and according to specification and under the inspection and to the satisfaction of the Government and was entitled to incur and pay on behalf of the Government and as its agent all proper and reasonable costs, for which it was to be reimbursed by the Government. What these costs were, was elaborately defined by the agreement. In addition to this reimbursement the Government was to pay the respondent certain specified fees for each tank and gun carriage produced in each month. To meet these charges a special account was opened at the Royal Bank of Canada to be drawn upon in advance by the respondent, the intention being to enable the respondent company to have sufficient funds available to meet all charges. The respondent was given full control over the management and operation of the plant and in the employment of labour of every description and in the purchase of all necessary materials and all other matters necessary or incidental to the performance of the contract, but all this was subject to such supervision, direction and control as the Government by its Minister should desire to exercise. The Government agreed by the first clause that the respondent was acting on behalf of the Government and as its agent in all matters pertaining to the performance of the contract and agreed to indemnify the respondent from all claims and liabilities of any nature whatsoever arising out of the performance of the contract and from responsibility for any failure or delay in carrying out the contract except in cases of definite bad faith or wilful neglect on the part of the respondent.

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The construction contract had as its object the eventual delivery in accordance with the specifications of gun carriages and tanks with a particular "fee" attached to each delivery and on this aspect the contract might appear to be a contract for the sale of goods to be manufactured to the order of the Government and subject to the conditions expressed. This was the conclusion reached by the House of Lords in a decision cited to their Lordships during the argument. The case is *Dixon* v. *London Small Arms Co. Ltd.* (1876), 1 App. Cas. 632. The question was whether the defendant company was liable to the owner of a patent for infringement of the patent in making small arms for the Government under contract. If the defendant had been the servant or agent of the Crown, it could have claimed the benefit of the Crown's exemption from the patent fees, but it was held by the House, reversing the Court of Appeal, that it was liable because it was a private contractor with the Crown, to supply a certain manufactured article and was not protected in what it did by any privilege attaching to the Crown. The decision depended upon a careful analysis of the contract in that case. Lord Cairns L.C. summed up his conclusion [pp. 645-6]: "During this process, what is the position of the person who is called the contractor? He is clearly not a servant of the Crown. . . .Is he, then, an agent of the Crown? My Lords, I cannot find any ground whatever for contending that the contractor is an agent of the Crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a very large and extensive character; he is a tradesman manufacturing certain goods for the purpose of supplying them according to a certain standard which is laid before them as a condition on which the goods will be accepted. . . . If the Respondents make the lock themselves the materials are provided by the Respondents, and the Respondents work upon those materials, not as agents of the Crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm." Lord Selborne stated at p. 660 that the question must be decided by a strict and accurate application of legal principles to the contract then before the House. Their Lordships are faced with a similar problem, which they must decide by examining the precise terms of the contracts before them. A decision upon one contract is not generally

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any real guidance in determining the effect of these or other particular contracts, except in so far as it throws light on general legal principles. The problem can be precisely stated to be whether the respondent in this case was an agent of the Government or whether it was acting on its own behalf in making the tanks and gun carriages for delivery to the Government. The antithesis was expressed by Marchand J. in the Court of King's Bench to be between a contract for the performance of work by estimate (*par devis et marché*) and a contract in which the respondent was an independent contractor (*entrepreneur*) and not agent (*mandataire*). Bissonnett J. was of opinion that the contract was one of work and labour (*le contrat de louage d'ouvrage, ou le contrat d'entreprise*) and that the respondent was an independent contractor. Walsh J. and St. Jacques J. (dissenting) were of opinion that the contract was one of mandate or for the lease of personal services. The Supreme Court agreed with the dissenting Judges in the King's Bench, and unanimously held that the contracts provided for a case of agency. Rinfret C.J.C. in delivering the judgment of the Court succinctly sums up his view of the position in these words [[1945] 4 D.L.R. at pp. 232-3]:

"The only difference between the construction contract and the production contract is that, under the latter, the Company receives a fee for its work; but, in each case and under each contract, banking arrangements are provided for so that the Company will not have to resort to its own funds. The Minister has full control throughout.

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"Therefore, the Company sells to the Crown for $1 land which it will get back at the same price, or which it will be paid for at its value if the Crown keeps it. It is to build and equip a plant and manufacture in it, as agent for the Crown, certain war implements, at the cost of the Crown, without using any of its funds, under the Crown's control and without any responsibility, except for bad faith or wilful neglect. Everything remains the property of the Crown and the agreements are revocable at any time. In my view, these contracts clearly provide for a case of agency."

The great difference of opinion on this question in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied

on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior. In the present case the business or undertaking is the manufacture of the warlike vehicles. The respondent might have been making them with a view to selling them to the Government for its own profit. The Government as purchaser might in that case advance funds or subsidize the work: the Crown might, as it would presumably, take powers of supervision, inspection and regulation, having specified the tests which each vehicle is to satisfy. The Government might even provide the material or the factory to the actual manufacturer. These and kindred powers might be very wide, without the result being that the manufacturer was not doing the work for his own profit and at his own risk. But in reviewing in the present case the contracts which are the determining matters, their Lordships with great respect to the Judges below who have taken a different view, find themselves in agreement with the judgment of the Supreme Court. The combined force of the whole scheme of operations seems to them to admit of no other conclusion. The factory, the land on which it was built, the plant and machinery were all the property of the Government which had them appropriated or constructed for the very purpose of making the military vehicles. The materials were the property of the

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Government and so were the vehicles themselves at all stages up to completion. The respondent supplied no funds and took no financial risk and no liability, with the significant exception of bad faith or wanton neglect: every other risk was taken by the Government. It is true that the widest powers of management and administration were entrusted to the respondent but all was completely subject to the Government's control. A "fee" was payable in respect of each completed vehicle, but when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the undertaking of the Government and not the undertaking of the respondent which was simply an agent or mandatory or manager on behalf of the Crown. The accuracy of the positive announcement in each of the contracts that the respondent was acting throughout under the contracts for and on behalf of the Government and as its agent cannot be controverted.

It follows that the respondent was not the "occupant". The land and building were the property of the Crown, so that the property tax is not exigible, nor did the respondent carry on or exercise a manufacture within the meaning of either art. 362a or art. 363 of the Charter. Thus in the judgment of their Lordships, the claim of the appellant to levy upon the respondent either the property tax or the business tax fails and should be dismissed.

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A separate point was raised on the question of the property tax for the first period, from November 1, 1941, to April 30, 1942. The general reasons already given have shown that in any event the tax was not in their Lordships' judgment exigible. But all the Judges in the Courts in Canada have held that the claim to property tax must fail also on a separate ground, namely, that the tax was levied on the respondent as owner or proprietor, whereas on the facts stated above, the property was vested in the Crown throughout the material period, as was fully explained to the appellant when it was first sought to impose the tax.

It is pointed out in the Courts below that this is not a mere matter of verbal inexactitude, but is a substantial difference. It is enough here to say that their Lordships agree on this matter with the opinions of all the Judges in Canada.

For the reasons given their Lordships are of opinion that the whole appeal should be dismissed and they will humbly so advise His Majesty. The appellant will pay the costs of both respondents.

Appeal dismissed.

J.C.*
1946
Oct. 23.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR CANADA...Appellant;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC..... } Respondent.

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[AND CONNECTED APPEAL.]

ATTORNEYS-GENERAL FOR SASKATCHEWAN, ALBERTA AND MANITOBA..... } Interveners.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Bank deposits—Not operated for thirty years—Deemed bona vacantia by provincial legislation—Constitutional validity—Ultra vires—"Banking"—An Act Respecting Certain Vacant Property Without an Owner, 1939 *(Geo. 6, c. 28) (Quebec), s. 1—British North America Act*, 1867 (30 & 31 *Vict., c.* 3), *s.* 91 (15); *s.* 92 (13).

Section 1 of c. 28 of the Statutes of Quebec, 1939, which provides that whenever "deposits of money and of securities and all credits "in specie or in securities . . . . . in credit institutions and all "other establishments which receive funds or securities on deposit" have not been for thirty years or more the subject of any operation or claim by the persons entitled thereto, they, with the fruits thereof, are to be deemed to be vacant property and without an owner, belonging to His Majesty in right of the province, was aimed primarily at certain deposits in banks in Quebec, and was ultra vires the provincial legislature as in pith and substance relating to "banking," a subject-matter within the exclusive legislative competence of the Dominion Parliament under head 15 of s. 91 of the British North America Act, 1867.

1947 A.C. p. 34.

Provincial Treasurer of Manitoba v. *Minister of Finance for Canada* [1943] S. C. R. (Can.) 370, referred to.

Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) [1943] K. B. (Quebec) 543, reversed.

Consolidated Appeals (No. 43 of 1944) from a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) (June 29, 1943), which affirmed a judgment of the Superior Court of the Province (Demers J.) (October 6, 1941), which held the Quebec Statute entitled "An Act "Respecting Certain Vacant Property Without an Owner" (3 Geo. 6, (1939) ch. 28) to be within the powers of the legislature of Quebec to enact and to apply to the Bank of Montreal. The Court of King's Bench consisted of

* *Present:* Viscount Simon, Lord Wright, Lord Porter, Lord Uthwatt and Sir Lyman Poore Duff.

Létourneau C.J., St. Germain, Walsh, Francoeur and Marchand JJ., Marchand J. dissenting.

The material clause in the Quebec Statute which came into force on April 28, 1939, ran as follows:—"The following "are deemed to be vacant property and without an owner, "belonging to His Majesty in the rights of the province of "Quebec, deposits of money and of securities and all credits "in specie or in securities, with the fruits thereof, in credit "institutions and all other establishments which receive "funds or securities on deposit, whenever, for thirty years "or more, such deposits or credits have not been the subject "of any operation or claim by the persons entitled thereto."

The following facts are taken from the judgment of the Judicial Committee: In November, 1940, the Attorney-General for Quebec instituted proceedings in the Superior Court alleging that the Bank of Montreal was a "credit "institution" within the meaning of the Act and that it held deposits of money, etc., made by certain depositors as set out in an attached list, which deposits had not been the subject of any operation or claim by the persons entitled thereto for thirty years or more. The declaration claimed that, in virtue of the Quebec statute, those deposits were deemed to be "vacant property and without an owner," and the Attorney-General for Quebec accordingly claimed that the defendant bank should pay over the total of those deposits to him, together with the total of certain other deposits in the Molson's Bank, which were similarly left untouched by their owners for more than thirty years and which had been taken over by the Bank of Montreal when it absorbed Molson's Bank.

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To that declaration the Bank of Montreal pleaded that it was not a "credit institution," so that the Act did not apply to it at all, and it also pleaded that the funds it had received from depositors were not "deposits" within the meaning of the Act. Apart from those special points, the bank raised the broad contention that the Act was beyond the powers of the Quebec legislature to pass, as "banking" was one of the subjects allotted exclusively to the Parliament of Canada, and, moreover, that the Bank Act of the Dominion, 1934 (24-25 Geo. 5, ch. 24) contained provisions with which the statute of Quebec was in conflict. On this last issue of the validity of the Quebec statute of 1939, the Attorney-General

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for Canada at once intervened to support the view that the Act of the Quebec lgislature was beyond its powers and void, at any rate in respect to banks, and on this appeal arguments were heard on his behalf, as well as on behalf of the Bank of Montreal, in support of the appeal. On the other side the Attorney-General for Quebec was supported by counsel acting for the Attorneys-General for Saskatchewan, Alberta and Manitoba.

1946. July 10, 11, 15, 16. *H. E. O'Donnell K.C.* and *W. R. Jackett* (both of the Canadian Bar) for the appellant the Attorney-General for Canada. The impugned Act is ultra vires as being directed to "banking," which, under head 15 of s. 91 of the British North America Act, 1867, is within the exclusive legislative competence of the Dominion Parliament. The Quebec statute strikes at the very heart and core of banking, as used in s. 91—the deposit contract and the rights and obligations flowing therefrom being a most essential part of banking. Moreover, the Quebec Act clashes with provisions of the Bank Act of the Dominion (24 & 25 Geo. 5, c. 24), which is legislation validly adopted under the provisions of s. 91 of the Constitution Act, and the federal enactment must prevail. The statute complained of extinguishes the liability of the bank to the depositor, contrary to the federal Act, which preserves that liability as long as the bank operates. Secondly, the Quebec statute provides in the circumstances therein set out for the confiscation of the depositor's rights and declares the deposits to be deemed to be vacant property without an owner belonging to the Crown in right of the province. Thirdly, it imposes a liability on the bank with respect to the deposit in favour of the Crown in right of the province. The effect, virtually, is that it abolishes the depositor's contract with the bank and the bank's debt to the customer. [Reference was made to *Tennant* v. *Union Bank of Canada* (1).] The position as to conflicts between ss. 91 and 92 of the British North America Act has been recently set out in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), which is very apposite. Admittedly the operation of banking might be regarded as "property and civil rights"—within the exclusive legislative jurisdiction of the province under head 13 of s. 92 of the Act of 1867—but inasmuch as it is a part of property and civil rights which is specifically

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(1) [1894] A. C. 31, 46.

(2) [1943] A. C. 356, 369-70.

referred to in head 15 of s. 91, that must of necessity remove it from the ambit of the jurisdiction of the province. For the province to succeed, it must show that its legislation in this respect overrides the Dominion's legislation on banking. In pith and substance this impugned provincial Act, which is invoked to justify taking money from the bank, is not anything other than banking when it is examined in the light of the rules of interpretation stated by this Board: *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). It is not, in effect, property and civil rights, but an attempt to get at the bank account; further, the Dominion has already legislated in respect of this very matter. *Bank of Toronto* v. *Lambe* (3) had nothing to do with the right of the province to go into banking as such.

It is submitted that Létourneau C.J. in his judgment in the present case misdirected himself as to the effect of *Provincial Treasurer of Manitoba* v. *Minister of Finance for Canada* (4). The alleged analogy which he found between that case and this did not exist; also there was there no question of the constitutionality of any enactment; the provincial Act did not conflict with anything, and nobody said that it did; a further aspect is that the two companies in that case were not banks. From the point of view of the depositor the present matter resolves itself into a question of prescription: the Quebec Act says thirty years, the Dominion Bank Act says no prescription. The province cannot enact a law which is one of prescription which would lead to a conflict with s. 92, sub-s. 2, of the Bank Act. The impugned Act is clearly colourable. The policy of the Dominion is that depositors are encouraged to leave their money with Dominion chartered banks with the full assurance that it is always available and fully protected. The law in Canada governing the relation between the banker and the depositor is virtually to the same effect as in *Foley* v. *Hill* (5): Quebec Civil Code, arts. 1762, 1777, 1782, 1778, 1779, dealing with irregular deposits. The impugned Act is directed principally and virtually against bank accounts, and it and the Bank Act cannot possibly go along side by side.

1947 A.C. p. 37.

(1) [1930] A. C. 111, 118.
(2) [1939] A. C. 117, 129, 133.
(3) (1887) 12 App. Cas. 575.
(4) [1943] S. C. R. (Can.) 370.
(5) (1848) 2 H. L. Cas. 28, 36, 43.

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L. A. Forsyth K.C. and *C. P. H. Carson K.C.* (both of the Canadian Bar) for the appellant the Bank of Montreal, adopted the argument for the Attorney-General for Canada —that the subject-matter of the Quebec Act is in pith and substance "banking"; that if it is not, then it is legislation with respect to a matter which is ancillary to banking, and the Dominion Parliament having legislated, its legislation must therefore override the provincial Act. On the further point—that the language used in the Act is not apt to apply to a bank or to an irregular deposit—it is submitted that the Bank of Montreal is not properly or legally described as an institution of credit, but should be described as a bank, which is the name attributed to it by its charter. The Bank of Montreal would not come under the phrase "other "establishments which receive funds or securities on deposit"; the word "deposit" in that context necessarily means a *real* deposit, i.e., the contract described in arts. 1794 to 1829 of the Civil Code in which the depositary has no right to use the thing deposited and must return to the depositor identically the same thing as was deposited, because it qualifies both "funds" and "securities" and must therefore have the same meaning in relation to both. Since only a *real* deposit can exist in respect of securities, it follows that the word "deposit" has a like meaning in respect of funds. It is not the usual function of a chartered bank to accept funds on such a basis, and it is therefore an improper description of a chartered bank to term it an establishment which receives deposits of this kind. The statute is derived from French law which will be found in the Journal Officiel of June 26, 1920. The French law specifically mentions banks, the Quebec statute does not. This omission is significant. The addition in the French version of the Quebec Act of the word "titres" after "sommes d'argent" furthermore makes untenable the contention advanced by the province to the effect that the statute applies both to regular and so-called "irregular" deposits.

1947 A.C. p. 38.

L. Emery Beaulieu K.C. (of the Canadian Bar) and *Gahan* for the respondent the Attorney-General for Quebec. The impugned Act is not one solely directed against banks; it is an Act of general application, and there are several other institutions in Quebec which also receive deposits of money and specie. On the main point, the real nature of the enactment must be looked at, and it is submitted that according to its

true nature and character the impugned Act is one relating to "property and civil rights" and not to "banking," and, further, that there is no conflict between the Act and the Dominion Bank Act: *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1); *Citizens Insurance Company of Canada* v. *Parsons* (2). If the words "property and civil rights" are used in their widest sense they undoubtedly include the law of succession, and of devolution and transmission of vacant estate, and they would also include ownership of things, even ownership of bona vacantia. That is fundamental to the submission that it is within property and civil rights. Before confederation vacant estate and vacant property fell to the Crown under the law of Quebec, and before confederation the validity of this Act would never have been challenged. The enactment under discussion is not substantially different from the general law of the province, the general principle being that bona vacantia belong to the Crown: art. 401 of the Civil Code, which has been supplemented by art. 636. It would not, of course, be competent for the province under the guise of amending its law relating to vacant property to invade the federal field by a false definition, and by an enactment which would be totally outside the scope and extent of what is generally known as succession. In the present case, however, the provincial Act is purely and simply an amendment to the general law of vacant property, and an amendment relating simply and solely to a question of evidence as to how should be established the facts which are required to constitute the vacant property. What has been done is merely to apply to deposits in banks a rule of evidence which is perfectly normal and well-known, called presumption. The law has inferred the consequence that the depositor died, and died leaving a vacant property—that is a presumption. So there is now in virtue of that legal presumption the same position as if there was full evidence of witnesses or documents to the effect that this depositor whose deposits are claimed had left a vacant property. The fact is established as it would have been established by any other kind of evidence. As soon as there is a judgment of the court the presumption has become absolute, and the property belongs to the province. The case under the general law of Quebec and under the impugned Act is only a difference of evidence.

1947 A.C. p. 39.

(1) [1892] A. C. 437, 442.

(2) (1881) 7 App. Cas. 96, 109.

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Some of these deposits have been dormant for over a hundred years; there must be some limit—it is against public policy that property should remain without an owner. Next, that presumption of thirty years is in conformity with the whole trend of Quebec legislation, under which every right is lost by thirty years of inactivity. The bank can never become the owner of these deposits, somebody must, and it is enacted that after thirty years that somebody will be the province.

Summing-up, this is nothing but a statutory modification of the general law of vacant property, and it is competent for the province to regulate the conditions under which certain kinds of property will be deemed to be vacant property. Létourneau C.J. said in effect that possession and ownership are different things, and that change of ownership is not a change relating to banking; it relates to property and civil rights: *Provincial Treasurer of Manitoba* v. *Minister of Finance for Canada* (1). The fact that the Act deals with a particular kind of deposit is not sufficient to make the Act incompetent. Deposits are essentially a part of banking operations, and the Act affects deposits, but the Act is not necessarily a banking Act for the sole reason that it affects bank deposits: [reference was made to a number of Acts affecting bank deposits which, he submitted, could not nevertheless be considered as laws relating to banking]. *Bank of Toronto* v. *Lambe* (2) held that banks themselves were subject to taxation by the province. [Reference was also made to *Citizens Insurance Company of Canada* v. *Parsons* (3) and *Attorney-General for Ontario* v. *Reciprocal Insurers* (4).] Transfer of ownership of the deposit itself, whether it be a bank deposit or one in any other credit institution, is governed by the law of the province of Quebec, and whether the transfer is made by an act of the depositor or by operation of the law makes no difference. There is no transfer of ownership in the deposit which is governed by the federal law, consequently, what relates to transfer of ownership is within provincial competency even if the object is a bank deposit. The change of ownership does not affect the operation of banking.

1947 A.C. p. 40.

(1) [1943] S. C. R. (Can.) 370, 380.
(2) 12 App. Cas. 575.
(3) (1881) 7 App. Cas. 96, 109.
(4) [1924] A. C. 328, 345.

Lastly, there is no conflict between the impugned Act and the Bank Act because they do not cover the same field. The provincial Act relates to ownership purely and simply; the Bank Act contains no provision relating to ownership of the deposit. Consequently, the field is open, and the provincial Act is a supplement to the federal Act inasmuch as it puts an end to the awkward situation of moneys being kept indefinitely without an owner. If it is property and civil rights, and if the Crown is a lawful claimant, payment to the Crown would discharge the bank. In *State of Oregon* v. *First National Bank of Portland* (1) it was said that "the "right of the state to escheat and hold the property of "absentee depositors is as ample and rests upon as sound "reasons of public policy as its right to escheat the property "of persons who have died, leaving no known heirs" (2); that is cited in aid. The enjoyment of unclaimed deposits in a bank is not in the regular business of the bank.

Gahan followed, and, also on behalf of the Attorneys-General for Manitoba, Saskatchewan and Alberta, interveners, whom he represented, adopted in its entirety the argument for the Attorney-General for Quebec. He referred to *McGregor* v. *Esquimalt and Nanaimo Ry.* (3) in relation to the power of the province to confiscate property.

H. E. O'Donnell K.C. replied.

OCT. 23. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above, and continued: It is convenient firstly to deal with the special contentions advanced by the Bank of Montreal as to the true interpretation of the Quebec statute, leaving until later the examination of the constitutional issue. None of the judges who have dealt with this case in Canada accepted the contention that the Quebec statute did not apply to banks in general, and to the Bank of Montreal in particular. On the contrary, Demers J. expressed the suspicion that the draftsman of the Act, while using the phrase: "credit institutions "and all other establishments which receive funds or securi- "ties on deposit," deliberately avoided the use of the word "bank" because the presence of this word would provoke a constitutional challenge. Be this as it may, their Lordships agree with the view unanimously taken in the Canadian

1947 A.C. p. 41.

(1) (1912) 61 Oregon 551. (2) Ibid. 554.
(3) [1907] A. C. 462, 468.

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courts that the statute is aimed at certain deposits in banks in Quebec. Neither can the bank's other special contention prevail, namely, that the only deposits referred to are so-called "regular" deposits, where the identical thing that is entrusted to the bank must be returned, which is the contract of commodatum in Roman law. It is clear from the language of the section that what are called "irregular" deposits, where the bank is not bound to return the identical coins, but to repay the amount of the loan (the contract of mutuum in Roman law) are also included.

The real issue that is left is the constitutional question, and this may be raised in two ways. *(a)* Does the exclusive power of the Parliament of Canada to legislate in the matter of "banking" (head 15 of the enumerated classes of subjects in s. 91 of the British North America Act) in itself establish the invalidity of a Provincial law dealing with bank deposits which for thirty years have not been the subject of any operation or claim by the persons entitled thereto? *(b)* Even if this is not so, do the provisions of the Dominion Bank Act on which the appellants rely, stand in conflict with the Quebec legislation so that the latter is invalid in so far as it conflicts with the former?

If the true subject-matter of the Quebec statute is "banking" it is ultra vires the Provincial legislature: if its provisions conflict with the Federal Act, the Federal Act must prevail. An answer therefore to either question in favour of the Dominion is sufficient to invalidate its provisions. Their Lordships propose accordingly to consider the earlier and more general question first. So long ago as 1894 the Board, through the mouth of Lord Watson, in *Tennant* v. *Union Bank of Canada* (1), pointed out that by s. 91 of the British North America Act, notwithstanding anything contained in the Act, the exclusive legislative authority of the Parliament of Canada extended to all matters coming within the enumerated classes, and went on to declare that some, at any rate, of those classes could not be operated without interfering with and modifying some of the ordinary rights of property, that one of those classes was "banking," and that that expression is wide enough to embrace every transaction coming within the legitimate business of a banker. "These" (i.e., the legislative powers

1947 A.C. p. 42.

(1) [1894] A. C. 31, 47.

of the Parliament of Canada), he adds, "depend on s. 91, "and the power to legislate conferred by that clause may be "fully exercised, although with the effect of modifying civil "rights in the Province." The matter which their Lordships have to determine is accordingly whether the transaction of receiving from depositors bank deposits and repaying those deposits to the depositors comes within the legitimate business of a banker. Prima facie it does, and the respondents admit that the receiving and payment of deposits comes within that category, but, they say, this function need not necessarily include payment out to the person who made the deposits or to his order; the question to whom they are to be paid is a matter of property and civil rights in the province. In their contention the Province, under this heading in s. 92, can regulate the transmission of property without interfering with the business of banking, and in doing so no more trenches on the field of banking than the general law does in regulating the transmission of property on death or its seizure in execution. The Bank, they say, must repay the money to a legal claimant, but the Province can determine who that legal claimant shall be; the Bank is concerned with the possession of the deposits not with their property, and prescription is a function of the Province which can determine when money becomes bona vacantia and passes to it as such. A transfer of property, they maintain, is incidental to property and civil rights and not to banking: the ownership of deposits is no concern of the bank. They support this contention by pointing out that within its own field the provincial legislature is not subordinate to the Dominion Parliament, but "continues to be free from the "control of the Dominion, and as supreme as it was before "the passing of the [British North America] Act"; *(see Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1)), and by citing such cases as *Bank of Toronto* v. *Lambe* (2) and *Attorney-General for Ontario* v. *Attorney-General for Canada* (3). It does not appear to their Lordships that much assistance in elucidating the contentions of the parties in the matter now in dispute is to be obtained from the principles laid down in these cases. The former has been explained in *Attorney-General for Alberta* v. *Attorney-General for Canada* (4), 1947 A.C. p. 43.

(1) [1892] A. C. 437, 442.
(2) (1887) 12 App. Cas. 575.
(3) [1894] A. C. 189.
(4) [1939] A. C. 117, 133.

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where it is pointed out that no suggestion of encroachment on the field of banking arose in *Lambe's* case (1), in which nothing was sanctioned other than a legitimate attempt to raise revenue for Provincial needs, and that many other interests besides banking were affected. In the latter an Act which gave assignments purely voluntary for the general benefit of creditors precedence over all judgments and executions not completely executed by payment, was held valid because, as no compulsion to make such assignments was imposed, the field of bankruptcy was not touched on, and in any case the provisions of the Act were merely ancillary to bankruptcy and insolvency.

Nevertheless, an answer is still required to the question, what is the pith and substance of this Act, the validity of which is challenged. No doubt in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in s. 91 it is under the terms of that section not to be deemed to come within the classes of subjects assigned exclusively to the legislatures of the Provinces, even though the classes of subjects looked at singly overlap in many respects. The whole scheme for distribution of powers must be looked at, as their Lordships pointed out in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). Moreover, as their Lordships laid down in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (3), it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in s. 91. "Legislation," says Lord Maugham in delivering the judgment of the Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (4), "coming in pith and substance "within one of the classes specially enumerated in s. 91 "is beyond the legislative competence of the Provincial legis- "latures under s. 92." In calling attention to these principles their Lordships are but repeating what has many times

(1) (1887) 12 App. Cas. 575.
(2) [1939] A. C. 117, 129.
(3) [1930] A. C. 111, 118.
(4) [1943] A. C. 356, 370.

been set forth in judgments of the Board, and it only remains to apply them to the individual case under consideration.

Is then, the repayment of deposits to depositors or their successors in title under the law as existing a part of the business of banking or necessarily incidental thereto, or is it concerned primarily with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking. The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley* v. *Hill* (1) as "the ordinary relation of "debtor and creditor, with a super-added obligation arising "out of the custom of bankers to honour the customer's "drafts." No question of possession of or property in the deposit arises. The obligation is mutuum not commodatum. Once the deposit is made there remains only a debt due from the banker to the customer. It is urged, however, on behalf of the respondents that the legislation is not aimed at banks. It is, they say, of general application and affects not banks only but credit institutions of all kinds. The Chief Justice of Quebec has pointed out in answer, and St. Germain J. appears to agree with him, that it is directed only at the banks because in every other case these deposits had already become the property of the depositors by prescription. In so stating he no doubt had in mind s. 92 of the Bank Act of the Dominion (24 & 25 Geo. 5, c. 24) and the fact that apart from those made by banks most loans are repayable at a fixed or indefinite time and not, as in the case of advances by banks, repayable on demand, so that, even if in some cases it may apply to other institutions, in the vast majority of cases, and primarily, the legislation now in question affects banks and them alone.

If that be the main object and effect of the Provincial Act it does, in their Lordships' view, invade the field of banking. It comes in pith and substance within that class, and the fact that it may incidentally affect certain other institutions cannot take away its primary object and effect. Indeed, the Chief Justice would himself have decided in favour of the appellants had he not felt himself constrained by the

(1) (1848) 2 H. L. Cas. 28.

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1947 A.C. p. 45.

reasoning of the Supreme Court of Canada in *Provincial Treasurer of Manitoba* v. *Minister of Finance for Canada* (1) to hold otherwise. That case decided that certain trust money in the hands of a trustee which had not been, and some of which could not be, distributed to the cestuis que trustent could not be regarded as bona vacantia, but that it passed to the Province under an Act which provided that: "2. All personal property, including money or securities "for money deposited with or held in trust by any person in "the province, which remains unclaimed by the person "entitled thereto for twelve years from the time when "such property, money or securities were first payable shall "notwithstanding that the depositee or trustee has delivered "or paid or transferred such personal property, money or "securities to any other person or official within or without "the province as depositee or trustee vest in and be payable "to His Majesty in the right of the province of Manitoba "subject only to His Majesty's pleasure with respect to "any claim thereafter made by any person claiming to be "entitled to such property, money or securities." The only question in that case material to that which their Lordships are now considering was whether the special Act was in conflict with ss. 139 and 140 of the Winding-up Act of the Dominion Parliament or trenched on the field of bankruptcy and insolvency. It was held that the special Act was not invalidated for either reason. The money in question was not simply a debt—it was trust money—a fund secured on immovable property, and was not an asset of the liquidator in the winding-up but held as trustee for the individual depositors. There was no reason therefore why the Province should not transfer the possession, which the court held to be all that passed, to the Attorney-General for Manitoba as trustee for the depositors, or, indeed, for that matter, to him as bona vacantia. Winding-up and insolvency were not interfered with—only property and civil rights: the sum in dispute being trust money could not be used by the liquidator in the winding-up. Hudson J., however, in delivering the judgment of the court, does say (2): "the "provisions of the Winding-up Act do not deal with owner-"ship but only with the immediate possession of the funds, "leaving the matter of ownership to be established later" and the learned Chief Justice in the appeal in the present

(1) [1943] S. C. R. (Can.) 370. (2) [1943] S. C. R. (Can.) 381.

case thought that an analogy might be drawn between money deposited with a bank and the trust fund, the right to which was litigated in this case in the Supreme Court.

As their Lordships have observed, however, money deposited with a bank is not trust money which the trustee must preserve and not use; on the contrary, it is lent for use, and the bank is not a trustee but a debtor to the depositor. The difference between property and possession of deposits does not come in question; the only obligation under which the bank lies is to repay a like sum in the like currency. Their Lordships, rejecting as they do the suggested analogy between the two cases, take the same view and reach the result at which the learned Chief Justice would have arrived if he had not regarded the decision in the Supreme Court as one which he ought to follow. In their view, a Provincial legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking.

Having regard to their view on the first point it is not necessary for their Lordships to express any opinion on the second. They will humbly advise His Majesty that the appeal should be allowed and the action dismissed, and that the respondents should pay the costs of the appellants the Bank of Montreal of the hearing before the Board and in both courts in Canada.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Bank of Montreal: *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Quebec and for the interveners: *Blake & Redden.*

J.C. 1947 — Jan. 13.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS ..... } Appellants;

AND

1947 A.C. p. 127.

ATTORNEY-GENERAL FOR CANADA AND OTHERS ..... } Respondents;

ATTORNEY-GENERAL FOR QUEBEC ..... } Intervener.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Appeal to Privy Council—Dominion legislation abolishing all appeals from all Canadian courts, Provincial and Dominion, civil and criminal—Constitutional validity—Intra vires—Bill 9 (introduced in 1939), entitled "An Act to amend the Supreme Court Act" of Canada—Supreme Court Act, R. S. C. 1927, *c.* 35, *s.* 54—*British North America Act*, 1867 (30 & 31 *Vict.*, *c.* 3), *ss.* 91, 92, 101, 129—*Statute of Westminster*, 1931 (22 *Geo.* 5, *c.* 4), *ss.* 2, 3, 4, 7.

By Bill 9, introduced into the Canadian Parliament in 1939 and entitled "An Act to amend the Supreme Court Act of Canada," it was provided that "The Supreme Court shall have, hold and exercise exclusive "ultimate appellate civil and criminal jurisdiction within and for Canada; "and the judgment of the court shall, in all cases, be final and conclusive," and that "Notwithstanding any royal prerogative or anything contained "in any Act of Parliament of the United Kingdom or any Act of the "Parliament of Canada or any Act of the legislature of any province of "Canada or any other statute or law, no appeal shall lie or be brought "from any court . . . . within Canada to any court of appeal, tribunal "or authority by which, in the United Kingdom, appeals or petitions to "His Majesty in Council may be ordered to be heard." The Bill further provided that the Judicial Committee Acts, 1833 and 1844, and all orders, rules or regulations made thereunder were repealed in so far as they were part of the law of Canada:—

Held, that Bill 9 was wholly intra vires of the Parliament of Canada, which, accordingly, was competent to enact in regard both to appeals from the Supreme Court of Canada itself and appeals direct from the provincial courts to His Majesty in Council that the Supreme Court should have "exclusive" and "ultimate" appellate, civil and criminal jurisdiction.

As to appeals from the Supreme Court itself, whereas before the passing of the Statute of Westminster, 1931, the power vested in the Dominion Parliament by s. 101 of the British North America Act, 1867, to establish a general Court of Appeal for Canada was necessarily subject to the

1947 A.C. p. 128.

prerogative right of His Majesty to grant special leave to appeal therefrom, since that right was not expressly or by necessary intendment excluded, that restriction or fetter on the legislative power of the Dominion had been removed by the Statute of Westminster, and it was accordingly within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court should be ultimate.

* *Present:* Lord Jowitt L.C., Viscount Simon, Lord Macmillan, Lord Wright, Lord Greene M.R., Lord Simonds and Lord Goddard C.J.

As to appeals direct from provincial courts to His Majesty in Council, s. 101 of the British North America Act "read and applied as prima "facie intended to endow the Dominion Parliament with power to effect "high political objects concerning the self-government of the Dominion ". . . . in the matter of judicature," imported authority to establish a court having supreme and final and exclusive appellate jurisdiction in Canada. Section 101 conferred a legislative power on the Dominion Parliament which by its terms overrode any power conferred by s. 92 of the British North America Act on the provinces or preserved by s. 129 of that Act. The words in s. 101, "notwithstanding anything in this Act," vested in the Dominion a plenary authority to legislate in regard to appellate jurisdiction which was only qualified by that which lay outside the Act, namely, the sovereign power of the Imperial Parliament. Accordingly, since the coming into operation of the Statute of Westminster, which gave the Dominion Parliament power to abrogate Imperial Statutes which qualified its attribute of sovereign power by an external constitutional limitation, the authority conferred by s. 101 stood unqualified and absolute.

Nadan v. *The King* [1926] A. C. 482, and *Crown Grain Co., Ld.* v. *Day* [1908] A. C. 504, referred to.

The decision in *British Coal Corporation* v. *The King* [1935] A. C. 500, can be supported on grounds which cover not only criminal cases, and not only civil cases falling within the subject-matter of s. 91 of the British North America Act, but also every other case which can be brought before any provincial court in Canada.

Viewing the matter from a wider point of view, it is not consistent with the political conception which is embodied in the British Commonwealth of Nations, that one member of that Commonwealth should be precluded from setting up a supreme court of appeal having a jurisdiction both ultimate and exclusive of any other member. Further, the regulation of appeals is "a prime element in Canadian sovereignty" which would be impaired if at the will of its citizens recourse could be had to a tribunal in the constitution of which it had no voice. It would be alien to the spirit with which the preamble to the Statute of Westminster is instinct to concede anything less than the widest amplitude of power to the Dominion under s. 101 of the British North America Act. That the law should be one and the same for all its citizens was only attainable if s. 101 now authorized the establishment of a court with final and exclusive appellate jurisdiction.

Judgment of the Supreme Court of Canada [1940] S. C. R. (Can.) 49, affirmed.

APPEAL (No. 26 of 1940), by special leave, from a majority judgment of the Supreme Court of Canada (January 19, 1940) on a reference by the Governor-General in Council of a question relative to the authority of the Parliament of Canada to amend the Supreme Court Act so as to give the Supreme Court of Canada exclusive ultimate appellate civil and criminal jurisdiction within and for Canada. 1947 A.C. p. 129.

The question referred to the Supreme Court was: "Is Bill 9, "entitled 'An Act to amend the Supreme Court Act,' or any "of the provisions thereof, and in what particular or par-

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"ticulars, or to what extent, intra vires of the Parliament of "Canada?" Bill 9, of the Fourth Session of the Eighteenth Parliament of Canada, provided as follows:—

"1. Section 54 of the Supreme Court Act, ch. 35 of the "Revised Statutes of Canada, 1927, is repealed and the "following substituted therefor:—

"54. (1) The Supreme Court shall have, hold and exer- "cise exclusive ultimate appellate civil and criminal juris- "diction within and for Canada; and the judgment of "the Court shall, in all cases, be final and conclusive.

"(2.) Notwithstanding any royal prerogative or any- "thing contained in any Act of the Parliament of the "United Kingdom or any Act of the Parliament of Canada "or any Act of the legislature of any province of Canada or "any other statute or law, no appeal shall lie or be brought "from any court now or hereafter established within "Canada to any court of appeal, tribunal or authority by "which, in the United Kingdom, appeals or petitions to "His Majesty in Council may be ordered to be heard.

"(3.) The Judicial Committee Act, 1833, ch. 41 of the "statutes of the United Kingdom of Great Britain and "Ireland, 1833, and The Judicial Committee Act, 1844, "ch. 69 of the statutes of the United Kingdom of Great "Britain and Ireland, 1844, and all orders, rules or regula- "tions made under the said Acts are hereby repealed in "so far as the same are part of the law of Canada."

"2. Nothing in this Act shall affect any application for "special leave to appeal or any appeal to His Majesty in "Council made or pending at the date of the coming into "force of this Act.

"3. This Act shall come into force upon a date to be fixed "by proclamation of the Governor in Council published in "the Canada Gazette."

1947 A.C. p. 130.

In the Supreme Court of Canada, Duff C.J., Rinfret, Kerwin and Hudson JJ. were of opinion that the Parliament of Canada was competent to enact the Bill referred in its entirety. Crocket J. held that the Bill was wholly ultra vires of the Parliament of Canada. Davis J. was of opinion that the Bill would be intra vires the Dominion Parliament if it was amended to provide that nothing therein should alter or affect the rights of any province in respect of any action

or other civil proceedings commenced in any provincial court and solely concerned with some subject-matter within the exclusive legislative competence of the province.

1946. Oct. 23, 25, 28, 29, 31, Nov. 1. *C. R. Magone K.C.* (of the Canadian Bar) for the appellant the Attorney-General for Ontario. Bill 9 falls within the exclusive powers committed to the provincial legislatures under s. 92 of the British North America Act, 1867, and particularly within heads 13 and 14, which are respectively, "property and civil rights "in the province," and "the administration of justice in the "province, including the constitution, maintenance, and "organization of provincial courts, both of civil and of "criminal jurisdiction, and including procedure in civil "matters in those courts." The Dominion relies on the powers under s. 91 and s. 101 of the Act of 1867, the former providing that the Parliament of Canada may make laws "for the peace, order, and good government of Canada, in "relation to all matters not . . . . assigned exclusively "to the legislatures of the provinces," and also in relation to certain enumerated exclusive subject-matters. Section 101 provided that "the Parliament of Canada may, not-"withstanding anything in this Act, from time to time, "provide for the constitution, maintenance, and organization "of a general Court of Appeal for Canada . . . ." The decision of the Judicial Committee in *British Coal Corporation* v. *The King* (1) was based on the powers of Parliament to legislate in relation to one of the specific heads under s. 91 of the Act of 1867, namely, head 27, "the criminal law . . ". . including the procedure in criminal matters." [Reference was also made to *Nadan* v. *The King* (2.)] Section 101 has been held to include the power to provide for appeals to the court set up thereunder in matters coming within the classes of subjects enumerated in s. 92, but this does not include the power to limit appeals from that court to His Majesty in Council in matters coming within the classes of subjects in s. 92: *Crown Grain Co., Ld.* v. *Day* (3). Bill 9 is primarily in relation to the administration of justice in the province. Admittedly, before the Statute of Westminster, 1931, there was no power in the Dominion to enact Bill 9, and since there has been no redistribution of legislative powers by the Statute of Westminster, Parliament cannot now pass the

1947 A.C. p. 131.

(1) [1935] A. C. 500. (2) [1926] A. C. 482.
(3) [1908] A. C. 504.

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Bill. The words of s. 7, sub-s. 1, of the Statute of Westminster are "nothing in this Act shall be deemed to apply to "the repeal, amendment or alteration of the British North "America Acts, 1867 to 1930 . . . ."; the words "repeal "or amendment" cover the whole field of legislative action that could be taken with regard to any statute. The Statute of Westminster was also a pact with the provinces; their powers were strictly preserved, and it must have been the intention that such a Bill as this, which before the Statute of 1931 could not have been enacted by the Dominion Parliament, should not be enacted after it was passed. Further, sub-s. 3 of s. 7 of the Statute of Westminster provided that the powers conferred by that Act on the Parliament of Canada or on the legislatures of the provinces should be restricted to the enactment of laws in relation to matters within the competency of the respective legislatures. The attempt on the part of the Dominion Parliament in 1937 to enlarge its legislative power under the Statute of 1931 was emphatically denied in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1). The only new power which the Dominion obtained under the Statute of Westminster was to legislate extra-territorially on a subject on which, before the Statute of Westminster was passed, it had power to legislate. My main contention is that, since the Act of 1931, full power now exists in the provincial legislatures to abrogate the right to appeal to the Privy Council as of right and also the prerogative right.

The long-standing right, provided by Acts of the Ontario legislature, to bring appeals as of right to the Privy Council, still exists in the provincial legislature, and, further, since the Statute of Westminster the provinces have the added right of abolishing the prerogative appeal. The right to legislate with respect to appeals to the Privy Council in civil cases is within the exclusive jurisdiction of the provincial legislatures: *McBride* v. *Ontario Jockey Club, Ld.* (2); *Beauharnois Light, Heat & Power Co., Ld.* v. *Hydro-Electric Power Commission of Ontario* (3); *Re Boulton, & Toronto Terminals Ry. Co., Ld.* (4); *Davis* v. *Shaughnessy* (5). This Board has recognized and acted on these provincial statutes for so many years that it must be taken that the power to legislate on appeals to this

1947 A.C. p. 132.

(1) [1937] A. C. 326, 354.
(2) (1925) 58 O. L. R. 267.
(3) [1937] O. R. 847.
(4) [1933] O. R. 816.
(5) [1932] A. C. 106, 111.

Board as of right is a power in relation to the administration of justice in the province, and that, therefore, one must find more exact words in s. 101 to permit the Dominion to say that there shall be no appeal from the provincial courts to the Privy Council. In connexion with both appeals—as of right and prerogative—all that is required to abolish effectually both classes of appeal is for the province to repeal the Privy Council Acts of 1833 and 1844. The power under s. 101 to constitute, organize and maintain a general court of appeal for Canada does not give the Dominion Parliament power to say that there shall be no appeal from that court to the Privy Council. Acting under the powers in s. 91, the Dominion might abolish appeals in relation to one of the subjects over which it has legislative jurisdiction, e.g., "criminal law," as in the *British Coal Corporation* case (1), and "bankruptcy and insolvency," as in *Cushing* v. *Dupuy* (2), but the limitation in s. 101, is under "constitution, organization and maintenance," words not wide enought to permit the Parliament of Canada to abolish appeals from the Supreme Court to the Judicial Committee, and certainly not wide enough to permit it to interfere with appeals direct from provincial courts to the Judicial Committee: *Consolidated Distilleries, Ld.* v. *Consolidated Exporters Corpn., Ld.* (3). When there is an appeal before the Supreme Court of Canada from one of the provinces, that is in relation to the administration of justice in the province. The royal prerogative exercised by way of special leave to appeal to His Majesty in Council is merged in the Judicial Committee Acts, 1833 and 1844, and there is now no prerogative to admit appeals apart from the statutes, which the provincial legislature may now repeal in so far as they affect provincial subject-matters: *Moore* v. *Attorney-General for Irish Free State* (4); *De Keyser's Royal Hotel, Ld.* v. *The King* (5); *British Coal Corporation* v. *The King* (1). The history of the authorities before the enactment of the Colonial Laws Validity Act, 1865, indicates that the legislatures of the Colonies had jurisdiction to enact laws affecting the royal prerogative to admit appeals to the Privy Council: *Cuvillier* v. *Aylwin* (6). After the Act of 1865 the authority of a colonial legislature to limit the prerogative appeal was

1947 A.C. p. 133.

(1) [1935] A. C. 500.
(2) (1880) 5 App. Cas. 409, 416.
(3) [1930] S. C. R. (Can.) 531.
(4) [1935] A. C. 484, 499.
(5) [1919] 2 Ch. 197, 216; [1920] A. C. 508, 526.
(6) (1832) 2 Knapp 72, 78.

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discussed in *Reg.* v. *Bertrand* (1) and *Cushing* v. *Dupuy* (2). It is submitted that since the Statute of Westminster the provinces are back to the position before the Colonial Laws Validity Act. The rationes decidendi of *Nadan* v. *The King* (3) and *Richelieu & Ontario Navigation Co.* v. *Owners of ss. Cape Breton* (4) are the same. Lastly, under the guise of legislating with respect to the institution of a superior court the Dominion is attempting to make laws in relation to appeals in civil cases, and under s. 94 of the British North America Act such a law can only operate if brought into force by the legislature of the province.

Summing up, the Parliament of Canada, having constituted a general court of appeal under the power given by s. 101, has exhausted its powers; that power under s. 101 does not include the power to say that there shall be no appeal to the Judicial Committee in exercise of the royal prerogative; in any case, that power does not carry with it the power to permit Parliament to abolish either appeals as of right or appeals in the exercise of the prerogative from the provincial courts. Granted that the decision in *Nadan's* case (3) is based on two grounds—repugnancy and lack of extra-territorial powers—the Statute of Westminster empowers the provincial legislatures to enact a law which is repugnant to an Act of the Imperial Parliament and to repeal it so far as it was part of the law of the province, and that specific enactment carries with it the right in the Ontario legislature to affect appeals, both as of right and prerogative.

Barton K.C. and *Gahan* for the appellant the Attorney-General for British Columbia. Bill 9 is ultra vires, first, because it falls within a subject-matter allotted to the province under s. 92 (14.), secondly, because it is not within any of the specifically enumerated heads of s. 91, and thirdly, it is not covered by s. 101. The Statute of Westminster cannot add or take away anything from the actual division of powers between Dominion and province; if the Dominion did not possess the power to pass this Bill before the Act of 1931, it is not given to it merely by the fact that its laws can now have extra-territorial effect. The general power of the Dominion to

1947 A.C. p. 134.

(1) (1867) L. R. 1 P. C. 520, 529.
(2) 5 App. Cas. 409, 416.
(3) [1926] A. C. 482.
(4) [1907] A. C. 112.

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legislate in respect of "peace, order and good government" is confined to subject-matters not falling within the exclusive legislative competence of the provinces under s. 92. The present matter is within the provincial sphere, and it is only in cases of emergency that the Dominion is permitted to legislate in respect of what would otherwise have been a provincial subject-matter. It has been held that the regulation of the right of appeal is a provincial matter; the province can say that there shall be no appeal from provincial decisions to the Judicial Committee because that is "administration of justice in the province"—words as wide as can be used. Had it been intended to endow the Dominion legislature with power to limit or take away the existing right of appeal from provincial courts to the Judicial Committee, there would have been some explicit and clear words to that effect, and it is impossible to read such an implied intention into the words of s. 101. If the words "constitution, maintenance and organization" in s. 101 confer power to say that there shall be no appeal to the Judicial Committee, the power is also given to the province by s. 92 (14.), where the same words are used. Further, it is difficult to suppose that there may be inferred from s. 101 a power which would be immediately rendered useless by the operation of the Colonial Laws Validity Act, which was passed two years before the Act of 1867. What s. 101 really means, is, nothing in this Act shall prevent the Parliament of Canada from constituting a Supreme Court, not more. In view of s. 129 of the British North America Act and of the provisions of the Statute of Westminster, the Judicial Committee Acts were not laws which under the Statute of Westminster the Parliament of Canada could interfere with; they were laws applying only to the provinces, and were not in any sense laws of Canada. A Dominion law which purports to repeal these Judicial Committee Acts either directly or indirectly, is invalid; the Statute of Westminster gives to the province only the power to repeal those Acts. The right of appeal to the Privy Council was a safeguard, and, if at the time British Columbia entered into the federation that right could be taken away by the federal Parliament, it is doubtful whether the province would have entered into the federation. There would have been plain, clear and precise words used, and the matter not left one of inference. It is not, therefore, within the power of the Dominion Parliament to pass Bill 9.

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[Reference was made to *British Coal Corporation* v. *The King* (1) and *Croft* v. *Dunphy* (2).] Bill 9 cannot be severed and should be held ultra vires as a whole.

Gahan for the appellant the Attorney-General for New Brunswick, referred first to the principles of construction: The language of the Constitution Act remains the same, but the changing circumstances may alter the way in which the language operates: *Henrietta Muir Edwards* v. *Attorney-General for Canada* (3); *Attorney-General for Canada* v. *Attorney-General for Ontario* (4). The subject-matter of appeals to His Majesty in Council is, and has been treated as, within the provincial sphere, as the administration of justice in the province. The question then arises whether s. 101 by necessary implication alters that provincial power, and, if so, to what extent? It is contended, alternatively, that if the province has not the power to legislate respecting appeals to the Privy Council, then the power does not exist in Canada. Appeals to the Privy Council from New Brunswick have always been regulated by Orders in Council, and their terms indicate that they are concerned in great measure with the administration of justice in the province. Rinfret J. (as he then was) said in his judgment that the words "the administration of justice in the province . . . "restrict the power to the administration of justice 'in " 'the province'. These words cannot include matters of "appeal from Canadian Courts to the Privy Council in "London," and he cited *Royal Bank of Canada* v. *The King* (5), *Brassard* v. *Smith* (6) and *Provincial Treasurer of Alberta* v. *Kerr* (7). It is submitted that those cases do not support Rinfret J.'s view—they are concerned with questions of taxation. By the same reasoning as is used in *Nadan* v. *The King* (8), when civil procedure is found to be a matter assigned to the province under s. 92 (14.), then appeal to His Majesty in Council as of right can only be abolished by the province and not by the Dominion. In *British Coal Corporation* v. *The King* (1) there is an express declaration by the Board that they are dealing only with the way the British North America Act works out in conjunction with the Statute of Westminster in regard

(1) [1935] A. C. 500.
(2) [1933] A. C. 156.
(3) [1930] A. C. 124.
(4) [1937] A. C. 326, 349.
(5) [1913] A. C. 283, 298.
(6) [1925] A. C. 371.
(7) [1933] A. C. 710.
(8) [1926] A. C. 482.

to the power that was given to the Dominion in respect of criminal law and procedure. The *British Coal Corporation* case (1) starts from the point where *Nadan's* case (2) left off. The latter case puts the reason for the invalidity of the impugned enactment—s. 1025 of the Criminal Code—on two grounds, extra-territoriality and repugnancy. As regards both Dominion and province the Statute of Westminster has removed the second of these restrictions, but as regards the province there is not in the Statute of Westminster an express declaration that the province has power to pass extra-territorial legislation. The fact that there is that prohibition in the province, however, does not transfer the right to the Dominion to exercise a power which is still within the provincial field—to legislate on appeals to the Privy Council. In *Cushing* v. *Dupuy* (3) the Board said that "bankruptcy and insolvency," in head 21 of s. 91 of the British North America Act, necessarily gives power to regulate procedure in bankruptcy matters, and treat it as part of civil procedure in the province. With regard to divorce procedure, see *Walker* v. *Walker* (4) and *Board* v. *Board* (5); the point is that in matters of divorce, copyright, etc., and every enumerated head, the question of the court which is to administer it and the procedure in that court is a matter for the province under s. 92; it makes no difference what the source of the law administered is, the procedure is a provincial matter.

Since the Statute of Westminster there would be nothing to prevent the legislature in New Brunswick passing an Act to say that, so far as the present effective Order in Council is part of the law of New Brunswick, it shall cease to apply, and that would be effective to abolish the right of appeal to the Privy Council; it would not involve anything taking place outside the province, and would be purely and simply concerned with the administration of justice in the province. As regards the prerogative appeal, it would still be under the administration of justice in the province, but after the Statute of Westminster, regard must be had to the extra-territorial limitation which exists in the case of the province. In *Macleod* v. *Attorney-General for New South Wales* (6) it was held that the New South Wales Act there in question

(1) [1935] A. C. 500.
(2) [1926] A. C. 482.
(3) 5 App. Cas. 409, 415.
(4) [1919] A. C. 947, 953.
(5) [1919] A. C. 956.
(6) [1891] A. C. 455, 458.

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had to be strictly confined to New South Wales. If the argument is right that the subject-matter of Bill 9 is prima facie within provincial powers under head 14 of s. 92, five things follow from it: *(a)* Each province can legislate on the subject-matter of appeals subject to two limitations, (i.) the extra-territorial limitation, and (ii.) the provincial legislation would give way to any Dominion legislation which was enacted under an over riding Dominion power. *(b)* It follows that the opening words of s. 91—legislation for the peace, order and good government of Canada— cannot avail the Dominion to justify legislation in respect of appeals to the Privy Council. *(c)* the Dominion cannot derive any help from the enumerated heads of s. 91, unless to the extent only to which those enumerated heads remove the administration of justice from the provincial field, that is to say, in criminal law and in bankruptcy. *(d)* Bill 9, s. 1, sub-ss. 2 and 3, could not be enacted by the Dominion Parliament, because they would be a power concerned with the administration of justice in the province. *(e)* There would be no positive power in the Dominion to regulate appeals to His Majesty in Council, it cannot find power in s. 101 to legislate on the general subject of appeals, at any rate, so far as the provincial courts are concerned. Section 101 gives no power to the Dominion Parliament to legislate in relation to appeals to His Majesty in Council.

Emery Beaulieu K.C. (of the Canadian Bar) for the Attorney-General for Quebec, intervening in support of the appellants. In Quebec, as in Ontario, there were created by statute rights of appeal as of right to His Majesty in Council before confederation, rights which have always been maintained, and Bill 9 purports to repeal all that legislation. The matter of appeals to the Privy Council is one relating to the administration of justice in the province, and, consequently, it falls under s. 92 (14.). The primary purpose of these words "in the province" was to safeguard the autonomy of the various provinces; each was entitled to legislate concerning the administration of justice within its own territory, but it could not have been intended to confine their powers to legislating on that subject-matter purely and simply to such procedure as would take place entirely and completely within the territory of the province; there are some which must take place outside: art. 137, Civil Procedure Code;

British Coal Corporation v. *The King* (1). Even if that construction is wrong, there is no doubt now that, under the Statute of Westminster, the provinces are completely endowed with the power of regulating appeals to the Privy Council; the right to abolish or regulate appeals to the Privy Council has been granted to the provinces whether this is a matter concerning legislation operating extra-territorially or not; there is no distinction, and the powers have been granted generally to the provinces. Head 14 of s. 92 of the British North America Act read with the Statute of Westminster entitles it to be said that the administration of justice in the province is assigned to the provinces irrespective of any of the provisions of the Colonial Laws Validity Act, and, even if it must include the right to repeal or amend the Judicial Committee Acts of 1833 and 1844.

On the second question, whether assuming that this matter does come within s. 92 (14.) it is removed from the authority of the provincial legislatures by s. 101 of the British North America Act, the argument for the appellants is adopted.

F. P. Varcoe K.C. (of the Canadian Bar) and *Charles Russell* for the respondent the Attorney-General for Canada. The first submission is that Bill 9 is within the powers of the Parliament of Canada under s. 101 of the British North America Act as legislation providing for the constitution of a general court of appeal for Canada, which legislation is valid notwithstanding any other provision in the Act. Two principles should be kept in mind in construing s. 101; first, that in such an Act as the British North America Act one would not expect to find spelt out in great detail all the incidental and necessary powers which the legislature is able to exercise—that is in answer to the suggestion that if s. 101 had been intended to assign to Parliament the powers necessary to do what Bill 9 does, there would have been more precise words; secondly, this Bill should be examined and interpreted in the first instance without reference to any other legislation, such as the Judicial Committee Acts or the Colonial Laws Validity Act, and its meaning should be found within the four corners of the British North America Act. *Attorney-General for Alberta and Winstanley* v. *Atlas Lumber Co., Ld.* (2) illustrates that the

(1) [1935] A. C. 500, 518. (2) [1941] S. C. R. (Can.) 87.

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Dominion Parliament has legislated in connexion with procedure by an Act which overrode a provincial Act which claimed to be justified under s. 92 (14.). The word "general" in s. 101 means that Parliament is enabled to legislate with reference to every appeal—the power extends generally to the provinces, generally to all cases and generally to all laws. The second submission is that Bill 9 is outside the terms of s. 92 of the British North America Act, and, therefore, within the legislative competence of the Dominion Parliament under the introductory part of s. 91 as legislation for the peace, order and good government of Canada. The pre-confederation statutes do not support the view that there was an appeal as of right, and after 1867 there was no power in the local legislatures carried over to legislate in relation to Privy Council appeals other than what is contained in s. 92 (14.). The authority under s. 92 (14.) to deal with appeals would be confined to such matters as, for example, execution. As was said by Duff C.J. in the present case, "to return to s. 92 (14.). The legislative powers of the "provinces are strictly confined in their ambit by the terri- "torial limits of the provinces. The matters to which that "authority extends are matters which are local in the "provincial sense" (1), and he referred to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2). A further point on s. 92 (14.) is that administration of justice is done by means of courts—it is a wide phrase—and, in so far as that is so, this sub-head is limited to provincial courts; appeals to this Board are by means of a non-provincial court, and, therefore, such legislation is not within s. 92 (14.). Judges merely function as delegates of the Judicial Committee: *The Queen* v. *Alloo Paroo* (3). It is submitted next that if the legislature of the province has any jurisdiction to legislate in relation to Privy Council appeals, that authority would be overridden by repugnant Dominion legislation on the same question: *Grand Trunk Ry. of Canada* v. *Attorney-General for Canada* (4), [Reference was also made to the propositions set out in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (5).] If the Parliament of Canada sets up a general court of appeal under s. 101, it is an essential component of such legislation that the decisions

(1) [1940] S. C. R. (Can.) 58.
(2) [1896] A. C. 348, 359, 365.
(3) (1847) 5 Moo. P. C. 296, 303.
(4) [1907] A. C. 65, 67.
(5) [1930] A. C. 111, 118.

of that court should be binding on all provincial courts, and, if the Dominion legislation contained a provision to that effect, it would be valid legislation in relation to the establishment of a general court of appeal. That is what is done when Parliament prohibits appeals to the Privy Council from those provincial courts. The substance of such legislation is to render the decisions of the Supreme Court of Canada binding on the courts of appeal of the province.

Even if the province has legislative power in relation to appeals, the power of Parliament incidental to s. 101 would enable Parliament to exclude Privy Council appeals—to enact everything that is contained in Bill 9. The provision in the Bill prohibiting appeals from provincial courts to the Privy Council is part and parcel of a proper and essential component in the legislative power of the Dominion. Lastly, even if the province has legislative power in respect of Privy Council appeals, the power of the Dominion Parliament under "peace, order and good government," to legislate in relation to matters of national concern would enable Parliament to enact this legislation. It may so provide as being a proper provision for the achievement of full national sovereignty and autonomy in Canada, and reliance is placed on such cases as *Attorney-General for Ontario* v. *Canada Temperance Federation* (1). A topic of frequent discussion in Canada is whether the Dominion is a self-governing autonomous State with all the attributes of government, including a complete and independent system of judicature. If Parliament comes to the conclusion that the public requirements of Canada indicate that the time has come to establish such an independent system of judicature, that is a matter of Dominion concern and not a matter of provincial administration of justice—it transcends matters of provincial concern. If Canada is to have in all respects a constitution comparable with that of the United Kingdom, it does appear that it should have such a court of ultimate and exclusive jurisdiction, binding in all respects and which is binding on itself.

Summarizing: (1.) Section 101 authorizes the Dominion Parliament to enact Bill 9 in toto, as being legislation to establish an exclusive ultimate court of appeal for Canada. (2.) Bill 9 as to any part is not within s. 92 (14.) because of

(1) [1946] A. C. 193.

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the following:—*(a)* the legislative power of the province is restricted to matters of a local or private nature in the province, which does not include Privy Council appeals. *(b)* Administration of justice in the province as to its ordinary meaning is cut down by ss. 101 and 91. *(c)* The phrase "administration of justice in the province" is cut down by what follows in head (14.), and is restricted to administration by means of courts over which the province has authority. *(d)* Appeals as of right, so called, are, in substance, identical with prerogative appeals by special leave. *(e)* The province is without extra-territorial power: *Nadan* v. *The King* (1); *British Coal Corporation* v. *The King* (2). *(f)* The province under the Statute of Westminster cannot repeal the Orders in Council under the Judicial Committee Acts since the province could not enact equivalent provisions. (3.) Legislation excluding appeals even if in one aspect provincial, in another is federal. (4.) Legislation excluding appeals is necessarily ancillary to s. 101. (5.) Bill 9 is by its inherent nature the concern of Canada as a whole.

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Charles Russell followed. The question is simply one of the construction of the British North America Act. The subject-matter of Bill 9 is appeals above the provincial level, and on the true construction of s. 92 (14.) this subject-matter is not within that head, and is, therefore, included in the general head of s. 91. All the heads of s. 92 are matters of a merely local or private nature: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3). The main head of s. 92 is (14.), administration in the province of justice—that is what it means. It would comprise various heads, the establishment of courts, procedure in those courts, execution of decisions, the giving effect to substantive laws, etc. Where one finds the phrase "administration in the province of "justice" including questions of courts in the province, that general phrase cannot include non-provincial courts. Further, that general phrase cannot be so construed as to include procedure in civil matters in non-provincial courts. It is abundantly clear that the Judicial Committee of His Majesty's Privy Council is not a provincial court. Therefore, taking head (14.) of s. 92 alone, the subject-matter of this Bill, which is super-provincial appeals, does not

(1) [1926] A. C. 482. (2) [1935] A. C. 500.
(3) [1896] A. C. 348.

fall within it. Alternatively, that subject-matter is dealt with expressly by s. 101, an overriding provision, which is available and can be used positively as including the subject-matter of this Bill, notwithstanding, as the section says, that it may impinge on what happens in the provinces. The Bill is clearly within the scope of a section establishing one general court of appeal for a geographical area consisting of States, and the main purpose and intention of that section was to achieve uniformity in the application of laws. Bill 9 is intra vires the Parliament of Canada.

The Attorneys-General for Manitoba and Saskatchewan filed cases adopting the case of the Attorney-General for Canada.

Magone K.C. replied.

1947. Jan. 13. The judgment of their Lordships was delivered by LORD JOWITT L. C. This appeal is brought from the judgment of the Supreme Court of Canada, given on January 19, 1940, on a question which was referred to that court under the provisions of s. 55 of the Supreme Court Act, R.S.C. 1927, ch. 35. From the recitals contained in the order of reference, which was made by the Governor-General in Council on April 21, 1939, it appears that, at the Fourth Session of the Eighteenth Parliament of Canada, Bill 9, entitled "An Act to amend the Supreme Court Act," was introduced and received first reading in the House of Commons on January 23, 1939, and that on April 14 of the same year the debate on the motion for the second reading of the Bill was adjourned in order that steps might be taken to obtain a judicial determination of the legislative competence of the Parliament in Canada to enact the provisions of the said Bill in whole or in part. The following question was accordingly referred to the Supreme Court of Canada for hearing and consideration:

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"Is said Bill 9, entitled 'An Act to amend the Supreme
" 'Court Act,' or any of the provisions thereof, and in what
"particular or particulars, or to what extent, intra vires
"of the Parliament of Canada?"

The contents of the Bill, a short, but pregnant, one, must be stated in full. [His Lordship read the provisions of the Bill, and continued:] On January 19, 1940, the Supreme Court certified that the opinions in respect of the question referred to it were as follows:—"By the court: The Parlia-

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"ment of Canada is competent to enact the Bill referred "in its entirety. By Crocket J.: The Bill referred is wholly "ultra vires of the Parliament of Canada. By Davis J.: "The Bill referred if enacted would be within the authority "of the Dominion Parliament if amended to provide that "nothing therein contained shall alter or affect the rights "of any province in respect of any action or other civil "proceedings commenced in any of the provincial courts "and solely concerned with some subject-matter, legislation "in relation to which is within the exclusive legislative "competence of the legislature of such province."

From this judgment of the court the Attorneys-General for Ontario, British Columbia and New Brunswick have by special leave brought this appeal, which the Attorney-General for Quebec has intervened to support. The Attorneys-General for Canada and for Manitoba and Saskatchewan are respondents to the appeal. The hearing of the appeal was postponed until the conclusion of the war. Their Lordships think it worth while to observe that H.M. Attorney-General in England took no part in the controversy, which has throughout been between the Dominion of Canada and certain of the provinces on the one hand and others of the provinces on the other hand. The single issue has been whether, as the appellants contend, the subject-matter of Bill 9 falls within the exclusive powers committed to the provincial legislatures of the Provinces of Canada under s. 92 of the British North America Act, 1867, or, as the respondents contend, is within the powers of the Parliament of Canada under s. 101 or, alternatively, under s. 91 of that Act. An alternative argument was faintly addressed to their Lordships by counsel for the appellants, that the Bill lay within the powers of neither provinces nor Dominion, but H.M. Attorney-General in England did not intervene to support this view and their Lordships see no valid reason for accepting it.

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The sections of the British North America Act to which it is necessary to refer are ss. 91, 92, 101 and 129. Sections 91 and 92 fall within Part VI of the Act, which is entitled "Distribution of Legislative Powers," and by s. 91 it is enacted that "It shall be lawful for the Queen, by and with "the advice and consent of the Senate and House of Com-"mons, to make laws for the peace, order, and good govern-

"ment of Canada, in relation to all matters not coming "within the classes of subjects by this Act assigned exclus- "ively to the legislatures of the provinces, and for greater "certainty, but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "(notwithstanding anything in this Act) the exclusive "legislative authority of the Parliament of Canada extends "to all matters coming within the classes of subjects next "hereinafter enumerated: that is to say,—". Then follow twenty-nine enumerated classes covering a very wide field, of which, for reasons which will later appear, mention must be made of number 27, "The criminal law, except the "constitution of courts of criminal jurisdiction, but including "the procedure in criminal matters." Section 91 ends with "the words "And any matter coming within any of the "classes of subjects enumerated in this section shall not "be deemed to come within the class of matters of a local "or private nature comprised in the enumeration of the "classes of subjects by this Act assigned exclusively to the "legislatures of the provinces."

Section 92 is as follows, "In each province the legislature "may exclusively make laws in relation to matters coming "within the classes of subjects next hereinafter enumerated; "that is to say,—". Then follow sixteen enumerated classes, in which the provincial aspect of the subject-matter is reiterated. It is on the fourteenth class that the appellants rely "The administration of justice in the province, including "the constitution, maintenance, and organization of prov- "incial courts, both of civil and criminal jurisdiction, and "including procedure in civil matters in those courts." They also call in aid the thirteenth class "Property and "Civil Rights in the province." The sixteenth and last class is "Generally all matters of a merely local or private "nature in the province."

1947 A.C. p. 144.

Section 101 (which falls within Part VII. of the Act, entitled "Judicature") is in these terms: "The Parliament of "Canada may, notwithstanding anything in this Act, from "time to time, provide for the constitution, maintenance, and "organization of a general court of appeal for Canada, and "for the establishment of any additional courts for the "better administration of the laws of Canada." Before stating how this power has been exercised it will be convenient to refer to s. 129 of the Act and briefly to restate

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the familiar facts in regard to appeals to His Majesty in Council.

Section 129 of the Act provides that, except as thereby otherwise provided, all laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, should continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless (except with respect to such as should be enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective provinces, according to the authority of the Parliament of that legislature under that Act. The Act further made provision for the admission of other colonies or provinces into the Union. The manner in which this power was exercised and the growth of Canada to a great Dominion are matters of history which need not be narrated here. Suffice it to say that to the provinces originally brought within the Union and to those afterwards admitted to it the relevant provisions of the British North America Act which have been cited equally apply. And for them all the question is the same, whether it is for them or for the Dominion to legislate in regard to appeals to His Majesty in Council whether from their own provincial courts or from the Supreme Court of Canada set up under s. 101 of the Act.

1947 A.C. p. 145.

Their Lordships have, in the consideration of this case, been greatly assisted by the elaborate statements appearing in the factums and formal cases of the parties, and in the opinions of the learned judges of the Supreme Court in regard to the manner in which the appeal from the several provinces to His Majesty in Council has from time to time been regulated. It does not, however, appear to their Lordships to be necessary to consider these matters in detail nor to distinguish those cases in which appeal is said to lie as of right from those in which it is said to lie by leave under the prerogative. This has been for practical purposes a convenient mode of division, but fundamentally in both classes of case the appeal is founded on that pre-

rogative which, as long ago as 1867 in *Reg.* v. *Bertrand* (1), was described as "the inherent prerogative right, and, on "all proper occasions, the duty, of the Queen in Council to "exercise an appellate jurisdiction, with a view not only "to ensure, as far as may be, the due administration of "justice in the individual case, but also to preserve the due "course of procedure generally." The exercise of this appellate jurisdiction is regulated generally by the Judicial Committee Acts, and, in regard to each of the provinces of Canada, either (as, for example, in the case of Manitoba) by Orders in Council or (as in the case of Ontario and Quebec) by provincial statutes made under the authority or assumed authority (it matters not which) of the Constitutional Act of 1791 or (as in the case of British Columbia) by an imperial statute, and the only difference between the two classes of case is that an appeal may be said to lie as of right when an appellant brings his appeal under the provisions of the relevant Order in Council or statute; when he cannot do so, but can only appeal by special leave of the Sovereign on the advice of the Judicial Committee itself, then the appeal is sometimes said to be under the prerogative, a description which, if it is intended to be exclusive, is inaccurate.

It is convenient shortly to restate what immediately after the Act and, indeed, at all times until the passing of the Statute of Westminster (to which reference will shortly be made) was the constitutional bar to legislation whether by Dominion or province in regard to appeals to His Majesty in Council. In the first place, it must be remembered that by the Colonial Laws Validity Act, 1865, any colonial law which was repugnant to the provisions of an Act of the United Kingdom extending to the colony either by express words or necessary intendment was void and inoperative to the extent of such repugnancy. It followed that neither Dominion nor province could then validly legislate so as to abolish a right of appeal to the King in Council which was provided by imperial Acts. In the second place, the doctrine which imposed a territorial limitation on the powers of colonial legislatures, might be regarded as a fetter on the legislative competence of Dominion or province to deal with the so-called "prerogative" right of appeal. In the third place, the express terms of the exception in s. 129

1947 A.C. p. 146.

(1) L.R. 1 P.C. 520, 530.

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of the Act, to which reference has been made, precluded any alteration of imperial Acts.

It is now necessary to return to s. 101 of the Act. Acting under its authority the Parliament of Canada in the year 1875 passed the Supreme Court of Canada Act, which has from time to time been amended and, as amended, is now R.S.C. 1927, ch. 35. Under that Act a Supreme Court of Appeal was established which, under s. 35, was to have, hold and exercise, an appellate civil and criminal jurisdiction within and throughout Canada. It prescribed the limits within, and the terms on which, an appeal might be brought from the courts of the provinces, and by s. 54 provided that the judgment of the court should in all cases be final and conclusive and that no appeal should be brought from any judgment or order of the court to any court of appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to His Majesty in Council might be ordered to be heard, saving any right which His Majesty might be graciously pleased to exercise by virtue of His royal prerogative. It is this s. 54 which the Bill now challenged seeks to amend, and two things may be noticed about the section as originally enacted. In the first place, it is silent, as is the whole Act, about appeals from the provincial courts to His Majesty in Council. In the second place, so far as appeals from the Supreme Court are concerned, it expressly saves the prerogative while denying any appeal as of right.

Such being the position before the year 1931, in that year was passed the Statute of Westminster, 1931, an Act of the Imperial Parliament, which has as its sub-title "An Act to give effect to certain resolutions passed by Imperial "Conferences held in the years 1926 and 1930." The recitals in the preamble of this Act, after referring to the reports of the Conferences, affirm that it is proper to set out that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles should thenceforth require the assent as well of the Parliaments of all the Dominions as of the Parlia-

1947 A.C. p. 147.

ment of the United Kingdom, and that it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. By s. 2, sub-s. 1, it is provided that the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of the Act by the Parliament of a Dominion (which, by definition, includes the Dominion of Canada), and by s. 2, sub-s. 2, that no law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion. By s. 3, it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. (It may be noticed that this power is not given to the legislature of a province.) By s. 4, it is provided that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. It remains only to refer to s. 7, which deals with Canada only. By that section it is provided (by sub-s. 1) that nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder; (by sub-s. 2) that the provisions of s. 2 of the Act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces, and (by sub-s. 3) that the powers conferred by the Act upon the Parliament of Canada or upon the legislatures of the provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the provinces respectively.

1947 A.C. p. 148.

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It is in the light of this Act of transcendent constitutional importance that the question must now be considered whether it is competent for the Parliament of Canada to enact not only that the Supreme Court of the Dominion shall have appellate civil and criminal jurisdiction within and for Canada, but also that that jurisdiction shall be "exclusive" and "ultimate." This question must be considered under two heads, first, in regard to appeals from the Supreme Court itself, and, secondly, in regard to appeals direct from the provincial courts to His Majesty in Council. First, then, as to appeals from the Supreme Court itself. Here the question is whether under sub-s. 1, of the substituted s. 54, the jurisdiction can validly be made "ultimate," by which, as the subsequent new sub-sections make clear, is intended the abolition of appeal from the Supreme Court to His Majesty in Council. On this question their Lordships can entertain no doubt. The power vested in the Dominion Parliament by s. 101 of the British North America Act to establish a general court of appeal for Canada was necessarily subject to the prerogative right of His Majesty, since that right was not expressly or by necessary intendment excluded, and this limitation was recognized in the first words of s. 54 of the Supreme Court Act. But that was a restriction or fetter on the legislative power of the Dominion which could be removed, and has been removed, by an Act of the Imperial Parliament, and, since it has been removed, it must be within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing Dominion.

Secondly, as to appeals direct from provincial courts to His Majesty in Council. It is in regard to these appeals that the validity of the Bill has been more strenuously challenged, and their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instrument, the authors of which did not contemplate the possibility of either meaning. For how could it be supposed in 1867, only two years after the passing of the Colonial Laws Validity Act, that the competence of either the Dominion or the provincial legislatures to pass laws directly repugnant to Acts of Parliament of the United Kingdom and to the common law relating to the prerogative could be the subject of judicial determination?

1947 A.C. p. 149.

Yet this is the question which must now be decided. In its solution their Lordships have the advantage of two recent pronouncements of the Board, *Nadan* v. *The King* (1) and *British Coal Corporation* v. *The King* (2), the first before, the second after, the passing of the Statute of Westminster, and it will be convenient to see what these cases decided.

In *Nadan's* case (1), the question was as to the validity of s. 1025 of the Criminal Code of Canada if and so far as it purported to prevent the King in Council from giving effective leave to appeal against an order of a Canadian court in a criminal case. Criminal law, including the procedure in criminal matters, was, it will be remembered, one of the subjects to which, under s. 91 of the Act, the exclusive authority of the Parliament of Canada extended. It was argued that the legislative power so conferred was complete, and included power to limit the royal prerogative to entertain an appeal. The Board, after a review of the prerogative and of the manner in which the Judicial Committee had been in effect established as a court of appellate jurisdiction, rejected the argument, holding that however widely the powers conferred by s. 91 were construed they were confined to action to be taken in the Dominion and did not authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal, and further holding that s. 1025 of the Criminal Code, if and so far as it was intended to have that effect, was repugnant to the Judicial Committee Acts and therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865.

In 1935 there came before the Board the *British Coal Corporation* case (2) in which the same question was raised, but with this vital difference, that in the meantime the Statute of Westminster had been passed. The section of the Criminal Code then in force purported in unambiguous terms to abolish the appeal to His Majesty in Council; "Notwithstanding any royal prerogative or anything "contained in the Interpretation Act or in the Supreme Court "Act, no appeal shall be brought in any criminal case from "any judgment or order of any court in Canada to any "court of appeal or authority in which in the United King-"dom appeals or petitions to His Majesty may be heard."

1947 A.C. p. 150.

(1) [1926] A.C. 482.

(2) [1935] A.C. 500.

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The validity of this provision was challenged by certain persons who sought leave to appeal in a criminal case from a judgment of the court of King's Bench (Appeal Side) of the Province of Quebec. But it was challenged in vain. The Board, after once more expounding the nature of appeals to His Majesty in Council, explained the decision in *Nadan's* case (1) thus: "Their Lordships are of opinion that "the judgment was based on two grounds only: (1.) that "s. 1025 was repugnant to the Privy Council Acts of 1833 and "1844 and was therefore void under the Colonial Laws "Validity Act, 1865; (2.) that it could only be effective if "construed as having an extra-territorial operation, whereas "according to the law as it was in 1926 a Dominion statute "could not have extra-territorial operation. These two "difficulties as the law then stood could only be overcome "by an Imperial Statute . . . . Such, their Lordships think, "is the meaning of the decision in *Nadan's* case (1) . . ." (2). The Board proceeded to consider the question whether the difficulties had been overcome. Recalling the words used by Lord Loreburn L.C., in delivering the judgment of the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for Canada* (3): "Now, there can be no "doubt that under this organic instrument the powers "distributed between the Dominion on the one hand and "the provinces on the other hand, cover the whole area of "self-government within the whole area of Canada. It "would be subversive of the entire scheme and policy of "the Act to assume that any point of internal self-govern-"ment was withheld from Canada" (words that their Lordships reiterate in regard to the present appeal), the Board concluded that both difficulties had been removed by the Statute of Westminster. "There now remain," it was said "only such limitations as flow from the Act "itself, the operation of which as effecting the competence "of Dominion legislation was saved by s. 7 of the statute, "a section which excludes from the competence of the "Dominion and provincial Parliaments any power of 'repeal, "amendment or alteration' of the Act" (4). It has been properly urged on behalf of the appellants that at the conclusion of their judgment the Board observed that they were dealing only with the legal position in Canada in

1947 A.C. p. 151.

(1) [1926] A.C. 482.
(2) Ibid. 516 (A.C.).
(3) [1912] A.C. 571, 581.
(4) [1935] A.C. 520.

regard to that type of appeal in criminal matters, and that it was there neither necessary nor desirable to touch on the position as regards civil cases. It was this consideration that led Davis J. in the present case to give the qualified opinion already cited in regard to the validity of the referred Bill. This opinion rightly recognizes that whether or not the reasoning of the Board in the *British Coal Corporation* case (1) extends beyond the subject-matter of legislation which was by s. 91 of the Act confided to the Dominion Parliament, at any rate it cannot be limited to one only of the twenty-nine classes of subject-matter enumerated in that section, and that just as an appeal to His Majesty in Council may by Dominion legislation be abrogated in respect of "the criminal law . . . including "the procedure in criminal matters," so it may be abrogated in respect of, e.g., class 21 "bankruptcy and insolvency" or class 22 "patents of invention and discovery."

But the conclusion reached by Davis J. involves a distinction which their Lordships would not willingly adopt. For if, as he holds, the subject-matter provides the test whether the right of appeal may be abrogated by Dominion legislation so that it may not be abrogated in respect of classes of subjects assigned exclusively to the provinces under s. 92, a strange result would follow. It must be remembered that in the provincial courts the subject-matter of litigation may arise as well under Dominion as under provincial legislation. The judicial and legislative spheres are not coterminous, provincial courts determining all questions except those for which a special court is set up under s. 101, whether the rights of the parties spring from the common law or Dominion or provincial statutes. Thus, if the right of the Dominion Parliament to prohibit appeals to His Majesty in Council from a provincial court depended on the subject-matter in suit, the result would be that from the same court an appeal might lie in one suit to the Supreme Court of Canada only but in another to that court or to His Majesty in Council, nor is it impossible that in the same suit two or more questions might be raised in respect of which different rights of appeal would arise. This result is yet more remarkable when it is remembered how wide is the scope of those classes of subjects which, falling within s. 91 of the Act, can on

(1) [1935] A.C. 500.

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this hypothesis be excluded from appeal to His Majesty in Council. Only the residue of civil cases, in which the rights of the parties were determinable by reference to other than Dominion legislation, would remain the subject of such appeal.

1947 A.C. p. 152.

Therefore, while their Lordships give full weight to the observation with which the judgment in the *British Coal Corporation* case (1) concluded and do not doubt that that case rightly decided that the Dominion Parliament was competent to exclude appeals in criminal cases for the reasons therein appearing, they must observe that that decision can be supported on wider grounds which cover not only criminal cases and not only civil cases falling within the subject-matter of s. 91, but also every other case which can be brought before any provincial court in Canada. In coming to this conclusion their Lordships do not think it useful to embark on a nice discrimination between the legislative powers contained in ss. 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of s. 92, "The "administration of justice in the province" would, if they were disembarrassed of any context, be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground of their decision; for it is elsewhere, it is in s. 101 of the Act that the solution lies.

In his judgment in the case under appeal the former Chief Justice of Canada, Sir Lyman Duff, used these words: "Assuming even that s. 92 gives some authority to the "legislatures [of the provinces] in respect of appeals to the "Privy Council, that cannot detract from the power of "Parliament under s. 101. Whatever is granted by the "words of the section, read and applied as prima facie "intended to endow Parliament with power to effect high "political objects concerning the self-government of the "Dominion (s. 3 of the B.N.A. Act) in the matter of judic-"ature, is to be held and exercised as a plenary power in "that behalf with all ancillary powers necessary to enable "Parliament to attain its objects fully and completely. "So read it imports authority to establish a court having

(1) [1935] A.C. 500.

"supreme and final appellate jurisdiction in Canada."(1) The vital words in the passage cited, with which their Lordships are in full agreement, are the words in the last line "and final." But in the opinion of their Lordships the same considerations lead to the conclusion that the court so established must have not only "final", or "ultimate" but also exclusive appellate jurisdiction. They would emphasize that s. 101 confers a legislative power on the Dominion Parliament which by its terms overrides any power conferred by s. 92 on the provinces or preserved by s. 129. "Notwithstanding anything in this Act" are words in s. 101 which cannot be ignored. They vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament. This was fully recognized in *Crown Grain Co., Ld.* v. *Day* (2).

What, then, is the power of the Dominion Parliament since the Statute of Westminster has come into operation? It is useful to examine what the position would be if now, for the first time, the Dominion legislature thought fit to exercise its power under s. 101. Nor is this a fanciful or inept mode of examination, for the power is to provide "from time to time" for a general court of appeal. To their Lordships it appears reasonably plain that, since, in the words used by Lord Robertson in delivering the opinion of the Board in the *Crown Grain Co.* case (3): "the subject in conflict belongs "primarily to the subject-matter committed to the Dominion "Parliament, namely, the establishment of the Court of "Appeal for Canada," to that Parliament also must belong the power not only to determine in what cases and under what conditions the appellate jurisdiction of that court may be invoked, but also to deny appellate jurisdiction to any other court. The natural attribute of sovereign power was no doubt qualified by an external constitutional limitation, namely, the existence of imperial statutes, but, given the power to abrogate such statutes, the authority conferred by s. 101 stands unqualified and absolute.

It is possible to regard this matter from a somewhat wider point of view, as, indeed, it is regarded in the judgment of

(1) [1940] S.C.R. (Can.) 63. (2) [1908] A.C. 504.
(3) Ibid. 507 (A.C.).

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Sir Lyman Duff. [Giving full weight to the circumstances of the Union and to the determination shown by the provinces as late as the Imperial Conferences, which led to the Statute of Westminster, that their rights should be unimpaired, nevertheless, it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *British Coal Corporation* case (1) a "prime element in Canadian sovereignty," which would be impaired if at the will of its citizens recourse could be had to a tribunal, in the constitution of which it had no voice. It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under s. 101 of the Act.]

In this connexion some argument was addressed to their Lordships on the importance of uniformity of legal decision, which, it was urged, could not be secured if appeal lay indifferently to the Supreme Court of Canada or to His Majesty in Council. For a decision of the Supreme Court would at least be final, though its jurisdiction would not on this hypothesis be exclusive. Against this it was contended that the British North America Act contained in s. 94 a provision whereby the postulated uniformity of law could be obtained. In their Lordships' opinion this section provides an imperfect remedy for a state of affairs in which an important Dominion Act might be finally interpreted in one way by the Supreme Court for a province which did not admit appeals to His Majesty in Council and in another way by the Judicial Committee for a province which did admit such appeals, neither tribunal admitting the authority of the other. But it is the possibility of such a conflict,

(1) [1935] A.C. 500.

creating a different law for different provinces out of the same Dominion Act, which points the way to a truer interpretation of the British North America Act in the light of the Statute of Westminster. It is, in fact, a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens. This result is attainable only if s. 101 now authorizes the establishment of a court with final and exclusive appellate jurisdiction. The words used by Lord Macmillan in delivering the opinion of the Board in *Croft* v. *Dunphy* (1), on a question that arose in regard to one of the specific subjects enumerated in s. 91 are equally applicable in the consideration of s. 101; "their Lordships," he said, "see no reason to restrict the permitted "scope of such legislation by any other consideration than "is applicable to the legislation of a fully sovereign state" (2).

It is right to conclude with some observations on s. 7 of the Statute of Westminster on which counsel for the appellants strongly relied. Sub-section 1 of s. 7 is in general terms, and it was urged that to interpret the statute as vesting in the Dominion Parliament a power which it did not before possess was in effect to repeal or amend or, at least, to alter the British North America Act. But their Lordships cannot accept this reasoning. Necessarily the effect of the statute is to amend and alter the Act in so far as from the operation of the statute there arises a new power in the legislatures of both the Dominion and the provinces. The question is, in which legislature the power is vested in regard to this particular subject-matter. That is a question of construction on which their Lordships have stated their opinion. Sub-section 2 does not call for further comment here. In regard to sub-s. 3 the same observations appear to apply as to sub-s. 1. If on the true construction of the British North America Act the conclusion had been that the power to legislate for the abrogation of appeals to His Majesty in Council was vested under s. 92 in a provincial legislature, that would have been an end of the matter. It is just because their Lordships have come to a different conclusion that sub-s. 3 does not assist the appellants.

Their Lordships are of opinion that this appeal fails, and that it ought to be declared that Bill 9 of the Fourth Session

(1) [1933] A.C. 156. (2) [1933] A.C. 163.

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of the Eighteenth Parliament of Canada, entitled "An "Act to amend the Supreme Court Act," is wholly intra vires of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorneys-General for Canada, Manitoba and Saskatchewan: *Charles Russell & Co.*

Solicitors for the Attorney-General for Quebec: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J.C.* 1947 July 24.

1947 A.C. p. 503.

ATTORNEY-GENERAL FOR ALBERTA . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND ANOTHER . . . . . } RESPONDENTS.

[AND CONNECTED APPEAL]

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada—Alberta—Social credit legislation—Constitutional validity—Expansion of credit by loans—"Banking"—Ultra vires—Severability—Alberta Bill of Rights Act, S. A. 1946, c. 11—*British North America Act*, 1867 (30 & 31 *Vict.*, *c.* 3), *s.* 91 (15.); *s.* 92 (13.).

Part I of The Alberta Bill of Rights Act, 1946, enumerated and declared certain rights of Alberta citizenship, including the right to the opportunity to engage in gainful employment, or, if that was not available, to a social security pension, and to receive the necessities of life adequate to ensure health and physical well-being, educational and medical benefits and retirement pensions. In Part II the Act set up machinery for expressing in monetary terms the natural, economic and human wealth and resources of the Province, and for utilizing credit deposits resulting therefrom in payment of the social security pensions and other benefits specified in Part I. Provision was made in Part II for the licensing by a Board of Credit Commissioners of all credit institutions, which admittedly included chartered banks, carrying on business within the Province, and for issuing to them Alberta Credit Certificates against which such institutions were to issue to customers, or create in their favour, "credit deposits" over and above the deposits against which a reserve of currency was held; for the transfer of customers' credit deposits; and generally for regulating the creation, expansion and contraction of, as well as all dealing in, credit where such credit was not based on a reserve of currency of an equivalent value, and for that purpose compulsorily to recruit the services and facilities of existing credit institutions.

Held, that it is not beyond the business covered by the word "banking" to make loans which involve an expansion of credit, and accordingly Part II of the Act, which aimed at restricting and controlling that practice, was in pith and substance legislation relating to "banking," a subject-matter within the exclusive legislative competence of the Parliament of Canada under head 15 of s. 91 of the British North America Act, 1867, and, accordingly, beyond the powers of the Provincial legislature to enact. Further, Part I of the Act was not severable; the whole Act hung together, and Part II being ultra vires there was nothing left which would have any effective operation and the whole Act was therefore invalid.

1947 A.C. p. 504.

Tennant v. *Union Bank of Canada* [1894] A. C. 31, at p. 46, and *Attorney-General for Canada* v. *Attorney-General for Quebec* ante p. 33, referred to.

Judgment of the Supreme Court of Alberta (Appellate Division) affirmed in part and reversed in part.

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* *Present:* VISCOUNT SIMON, LORD MACMILLAN, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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ATTORNEY-GENERAL FOR ALBERTA v. ATTORNEY-GENERAL FOR CANADA.

APPEAL and CROSS-APPEAL (consolidated) (No. 22 of 1947) from a judgment of the Supreme Court of Alberta (Appellate Division) (December 17, 1946), on a reference to it by the Lieutenant-Governor in Council of the following question: "Is the Alberta Bill of Rights Act, S. A. 1946, c. 11, "intra vires the legislature of Alberta, either in whole or "in part, and if so, in what part or parts, and to what extent?"

Part I of the impugned Act declared certain existing rights of Alberta citizenship and the right of every citizen to gainful employment or, if such employment was not available, to a social security pension, and to educational, medical and retirement benefits, and Part II provided a method of making effective the provisions of Part I by conferring on the Province control over the creation of credit by chartered banks and other credit institutions over and above their cash reserves.

The relevant provisions of the impugned Act appear from the judgment of the Judicial Committee.

The Supreme Court of Alberta (Harvey C.J.A., Ford, O'Connor, Macdonald and Parlee JJ.A.) held that Part II of the Act was ultra vires, and Part I intra vires, the legislature of Alberta.

The cross-appeal was by the Attorney-General for Canada against the decision that Part I of the Act was intra vires.

1947. June 23, 24, 26. *Lucien Maynard K.C.* (Attorney-General for Alberta) and *H. J. Wilson K.C.* (Deputy Attorney-General for Alberta) for the Attorney-General for Alberta. The first question is whether the Province has the constitutional authority to establish the rights of citizenship in the manner provided in Part I of the impugned Act. Part II provides the method—and not necessarily the only one—of making effective the provisions of Part I. That method is the exercise by the Province of the control over the creation of credit by the chartered banks and other credit institutions over and above their cash reserves. The second question, therefore, is whether the Province has the constitutional authority to enact the provisions of Part II. The respondents claim that the power to expand credit over and above cash reserves is properly a matter exclusively reserved to the Dominion by virtue of its authority to legislate on matters relating to "banking" and allied matters. The appellant, on the other hand, submits that

1947 A.C. p. 505.

Part II does not deal with "banking" within the meaning of that word as used in the British North America Act at the time of confederation, and that consequently the control of the issue and creation of credit by the chartered banks over and above their cash reserves is within the legislative competence of the Province. [Reference was made to the Report of the Royal Commission on Canadian Banking, 1933 (the Macmillan Report), pp. 43 and 44.] While it is conceded that banks deal with credit as part of ordinary banking operations, it is contended that the practice which the banks have assumed of expanding credit over and above their cash reserves did not constitute the practice at the time of confederation, is not banking practice within the meaning of that word in the British North America Act, and is not in conflict with any provision of the Dominion Bank Act, and that consequently there is a field reserved to the Provinces under the general heading of "property and civil rights," and the Province may legislate in regard to this field even though it affects banking operations. That is the broad submission. The appellant must first bring himself within s. 92 of the Constitution Act, and he must also show that the Act in question does not relate to "banking" and that it does not infringe on any other sub-head of s. 91.

"Credit" extends far beyond the legitimate province of banking; jurisdiction in regard to credit is inseparable from jurisdiction over "property and civil rights," and jurisdiction over credit is neither exclusively nor by necessary implication reserved to the Parliament of Canada in the Act of 1867. The financial credit of the Province is the ability and intention of the people to produce goods and services. [The history of banking was dealt with to show the relationship which existed between credit and banking, and reference was made to the practice at the time of confederation, and to Breckenridge, Canadian Banking System, p. 243, and to Curtis on Statistical Contributions to Canadian Economic History—Statistics of Banking.] The foregoing establish that at the time of confederation banks had not then assumed the practice of expanding credit as they are doing to-day: *Goodwin* v. *Robarts* (1). It is a function which cannot be recognized as coming within the field of Dominion legislation. Although banking is properly a dealing in credit, it cannot be said that all

1947 A.C. p. 506.

(1) (1875) L. R. 10 Ex. 337, 348, 350-1.

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dealing in credit is banking—that is the crux of the argument. There must be a dividing line, and it is submitted that the fundamental difference to be recognized by the court is as follows: To the extent that a person *(a)* issues notes or bills under the statutory authority of Parliament and such issue is based entirely on his credit, that is, the confidence of the public in his ability to redeem these notes on demand in legal tender; and *(b)* lends the notes so issued as well as any currency under statutory authority to the public on the strength of credit, that is, the confidence he has in the capacity, ability and integrity of the public to repay its loans; and *(c)* issues notes or bills under statutory authority which are universally accepted as a medium of exchange or money; he is a dealer in credit within the meaning of banking as defined in the British North America Act. To the extent that a person *(a)* advances credit to an individual by supplying him with goods to be paid for in the future; and *(b)* keeps a record of credit advances in his books of account; and *(c)* uses his own credit, that is, the confidence placed in him by the public and bankers, to borrow and lend; and *(d)* keeps a written record of the transactions of the public on the strength of his credit, that is, the confidence or trust the public has in him to keep the records correctly and honestly; and *(e)* extends credit which is transferable and can be used by means of a cheque, that is, the confidence of the public in the maker of the cheque, and which is not universally accepted and cannot be said to be a medium of exchange, money or currency; does all or any of these things and does not issue notes intended to circulate as money, he is not dealing in credit within the meaning of the term banking as used in the British North America Act. The term "banking" as used in s. 91, head (15.) of that Act should not be given a more extended meaning that that which it had at the passing of the Act: *Rex* v. *Cotton* (1). It then had a definite and specific meaning, and the Dominion Parliament could not legislate with respect to matters not ordinarily included in the term banking at that time—which did not include expanding credit—and those matters would otherwise be included under the head "property and civil "rights" and within the jurisdiction of the provincial legislatures. [On the construction of statutes reference was made to Craies on Statute Law, 4th ed., pp. 83-4.] To carry out

1947 A.C. p. 507.

(1) (1912) 45 S. C. R. (Can.) 469, 508.

the responsibilities imposed on them by the British North America Act the Provinces must have the constitutional authority to use the credit of the people of the Provinces, otherwise the Provinces are saddled with responsibilities which they cannot discharge; any other interpretation of the Constitution Act would lead to an absurdity. Lastly, the argument as to the restricted meaning of "banking" is supported by reference to an analogous situation in respect of the interpretation of the words "regulation of trade and "commerce"—it has been held in many cases that those words in s. 91, head (2.) should be given a restricted meaning, because to give them their literal meaning would give the Dominion Parliament wide powers which were not intended by the framers of the Constitution Act: *Citizens Insurance Company of Canada* v. *Parsons* (1); *In re The Board of Commerce Act*, 1919 (2). The Alberta Bill of Rights Act is not banking legislation.

H. J. Wilson K.C. followed. The judgment below of the Supreme Court stated that "it has been repeatedly held that "while the Dominion in legislating on subject-matters "assigned to it may infringe on subject-matters assigned "to the Provinces the converse is quite otherwise, and that "the right of the Provinces, though stated to be exclusive, "is qualified, and that provincial legislation though on a "subject-matter assigned to the Provinces cannot be per-"mitted to infringe on subject-matters assigned to the "Dominion." It is that converse proposition which is in error; it is submitted that if provincial legislation is in pith and substance on a provincial subject-matter it is valid notwithstanding that it infringes on a Dominion matter. If the impugned Act relates to "property and civil rights" it may incidentally affect or infringe on a Dominion subject-matter without being invalid provincial legislation. Authorities which bear out that proposition are *Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (3), *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (4) and *Lymburn* v. *Mayland* (5). The two following cases show the extent to which a Province may affect or infringe on a Dominion matter if the provincial legislation falls within s. 92: *Ladore* v.

1947 A.C. p. 508.

(1) (1881) 7 App. Cas. 96.
(2) [1922] 1 A. C. 191.
(3) [1899] A. C. 367.
(4) [1902] A.C. 73.
(5) [1932] A. C. 318, 324.

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Bennett (1), *Day* v. *Victoria (City)* (2). [Reference was also made to *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Another* (3), *Attorney-General for Alberta* v. *Attorney-General for Canada* (4) and *Attorney-General for Canada* v. *Attorney-General for Quebec and Others* (5).] If the impugned Act is banking legislation, or if it is in conflict with valid Dominion legislation, the appellant cannot succeed. It is submitted, however, relying on the principles in the cases cited, that the Act, relating as it does to the control and regulation of credit and not specifically directed to banking or banks or any of the subjects assigned exclusively to the Dominion, although it may incidentally affect banks and the issue of credit by banks, in pith and substance relates to "property and civil rights" and is within the competence of the provincial legislature.

G. H. Steer K.C. and *D. W. Mundell*, for the Attorney-General for Canada, were only required to deal with the cross-appeal. Part I of the Act is not severable from, but on the contrary is wholly dependent on, Part II. The court cannot presume, nor is there evidence, that the legislature intended to pass Part II of the Act alone. On the contrary, there is such a necessary connexion between Part I and Part II as to furnish cogent evidence that the legislature did not intend to enact one part without the other. Section 28 of the Act also furnishes evidence that the legislature intended that the Act should come into force as a whole or not at all. [Reference was made on the point of severability to *Attorney-General for Manitoba* v. *Attorney-General for Canada* (6), *In re Validity of Manitoba Act* (7), *Attorney-General for Canada* v. *Attorney-General for Ontario* (8) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (9).)] The preamble of the impugned Act is intended to be read as explanatory of the whole Act, and it shows, as does s. 28, that the Act was intended to stand as a whole. There is nothing in the Act which would justify the Government of Alberta in paying social security pensions in any other form than this new form of money which is set up—the credit

1947 A.C. p. 509.

(1) [1939] A. C. 468, 480.
(2) (1938) 3 W. W. R. 161, 184.
(3) [1940] A. C. 513, 532.
(4) [1943] A. C. 356, 369.
(5) Ante pp. 33, 43 (A.C.).
(6) [1925] A. C. 561, 568.
(7) [1924] S. C. R. (Can.) 317, 323.
(8) [1937] A. C. 355, 367.
(9) [1937] A. C. 377, 389.

system. One cannot conceive of the legislature passing Part I of the Act unless they had also passed Part II which provides the means of payment.

E. J. Chambers K.C. for the Canadian Bankers' Association, the second respondents to the main appeal, said that they were not a party to the cross-appeal.

Lucien Maynard K.C. Part I of the Act is clearly within the legislative competence of the provincial legislature, relating, as it does, to property and civil rights, and it is severable from Part II. There are two points on severability; first, whether Part I forms an inextricable part of the Act as a whole; it does not; it is not so inextricably interwoven with Part II that it cannot stand by itself as a separate enactment. Secondly, the Board cannot assume that if Part II is invalid the legislature would not have passed Part I in itself. The wisdom of the legislature in passing any enactment should not be passed on so long as the enactment was within the competence of the legislature. The pith and substance of this legislation is to provide the people of the Province with increased social services. [Reference was made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1) and *Toronto Corporation* v. *York Corporation* (2).]

There was no reply.

July 24. The judgment of their Lordships was delivered by VISCOUNT SIMON. In this matter consolidated appeals by the Attorney-General for Alberta and the Attorney-General for Canada respectively are brought before the Board from a judgment of the Supreme Court of Alberta (Appellate Division) to which, by the order of the Lieutenant-Governor in Council of Alberta, the question of the validity of "The Alberta Bill of Rights Act" (c. 11 of 1946) had been referred. The Supreme Court decided that Part II of the Act was invalid in as much as the Alberta legislature had no power to make a law in relation to the subject of "banking," which is part of head 15 of the enumerated classes of subjects which s. 91 of the British North America Act exclusively assigned to the Parliament of Canada. The Supreme Court also held that Part I of the Act was intra vires of the Alberta legislature and did not pronounce that the Act

(1) [1937] A.C. 377. (2) [1938] A.C. 415.

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1947 A.C. p. 510.

was invalid as a whole. The reasons for the judgment of the Supreme Court of Alberta were given by Harvey C.J.A., and were concurred in unanimously by the rest of the court which consisted of Ford J.A., O'Connor J.A., Macdonald J.A. and Parlee J.A.

The Attorney-General for Alberta contended before the Board that Part II was not legislation relating to "banking" within the meaning of head 15 of s. 91, but was in pith and substance legislation relating to "Property and civil rights "in the Province" (head 13 of s. 92). The Attorney-General for Canada contended that the decision of the Supreme Court of Alberta that Part II of the Act was invalid was correct and should be upheld, while in the cross-appeal he urged that the rest of the Act was not severable from Part II with the result that the whole Act was invalid. The Canadian Bankers' Association, which was the second respondent in the appeal of the Attorney-General for Alberta, appeared before their Lordships to assist in upholding the decision of the Supreme Court as to Part II of the Act.

Their Lordships have therefore two questions before them, first, as to the validity of Part II of the Act, and, secondly, if Part II is held to be invalid, whether Part I of the Act none the less survives as severable and effective legislation. Their Lordships will deal with these two questions in turn. It is first necessary to set out the relevant parts of the Act, both for the purpose of reaching a conclusion as to the validity of Part II and for the purpose of seeing whether the rest of the Act can stand if Part II goes. The Act begins with a long preamble which is preliminary to the division into two parts. The preamble is composed of seven paragraphs, the first three of which make reference to the purposes for which the two world wars were fought and to the duty which now rests on the Canadian people "to win the "peace by so ordering their internal economy that the "freedom and security for which they fought may be "experienced in reality by all of our citizens." The fourth recital runs as follows: "Whereas the Province of Alberta "possesses all the human and material resources necessary to provide for its citizens the material security essential "to the enjoyment of personal freedom." The fifth recital is: "Whereas The British North America Act imposes "upon the Province the constitutional responsibility of "providing its citizens with an opportunity to realize and

"enjoy their property and civil rights." The sixth and seventh recitals are of considerable importance as indicating the main purposes of the Act and as bearing on the connexion between Part I and Part II. They run as follows: "Whereas "the discharge of the Province's responsibility necessitates "the recognition of certain basic rights and responsibilities "of citizenship and requires that its citizens have the neces- "sary access to their resources so that they may produce the "goods and services they require and provide for their equit- "able distribution in a manner that will ensure to all an "opportunity to obtain social and economic security with "personal freedom; and Whereas the control of policy with "respect to the issue, use and withdrawal of credit primarily "determines the extent to which the citizens of Alberta "may develop and enjoy the use of their resources and "therefore must be a function of the electorate of the "Province to be discharged on their behalf by their demo- "cratically elected representatives." Their Lordships would observe, before going further, that the sixth recital asserts the necessity of two things which are united by the conjunction "and." It will be seen hereafter that the first of these elements is to a large extent the substance of Part I, while the second of them is sought to be dealt with in Part II. The final recital will be found to express the effective purpose of the Bill which, when it is read as a whole, seems plainly to be an application of the economic theory of what is called social credit.

The preamble is followed, in s. 2, by a number of definitions, one of which, namely, the definition of "social security "pension" is of special importance. Their Lordships would again observe that these definitions precede any division of the Act into parts. The definition referred to is as follows: "2.—*(f)* 'Social Security Pension' means the payment to "individuals, as herein provided, of claims on goods and "services within the limitations of the natural resources of "the Province and the productive capacity of the people, "to ensure an annual income of not less than six hundred "dollars a year on the basis of the 1945 price level for every "single citizen of Alberta nineteen years of age and over.

"Provided, however, that in the case of married persons, "for the purpose of determining the amount of the payment "to either spouse, the income of the two spouses shall be "considered as if it were their joint income."

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1947 A.C. p. 512.

Then comes Part I, which consists of twelve sections, the first ten of which are all introduced by the words "it is hereby "declared." Sections 3 to 8 appear to be mere declarations of common law rights. The language employed might, perhaps, raise questions as to their precise application—for example how does s. 7 apply to the case where a man's property is requisitioned or acquired on compensation terms for a public work or railway? But it is unnecessary to delay over these sections since nobody can suppose that the purpose of the Alberta legislature in passing this legislation would justify the view that they would intend these sections to stand if the clauses which carried out the main purpose of the Bill had to be regarded as a nullity. There follow in Part I, ss. 9 to 12, which must be set out:

"9. It is hereby declared that every citizen of Alberta of "not less than nineteen years of age and not more than sixty "years of age is entitled as a right of citizenship to—

"*(a)* the opportunity to engage in gainful employment; "or

"*(b)* if gainful employment is not available, to a social "security pension.

"10. It is hereby declared that every citizen of Alberta "under nineteen years of age is entitled as a right of "citizenship to

"*(a)* the necessities of life adequate to ensure health "and physical well-being;

"*(b)* educational benefits;

"*(c)* medical benefits.

"11. It is hereby declared that every citizen of Alberta "who has reached the age of sixty years is entitled as a right "of citizenship to retire from gainful employment and upon "retirement to receive,

"*(a)* a pension of such amount as may from time to time "be authorized by an Act of the legislature, provided that "such pension shall not be less than the current amount "of the social security pension;

"*(b)* medical benefits.

"12. It is hereby declared that every citizen of Alberta "who becomes physically disabled and unable to engage in "gainful employment is entitled to,

"*(a)* a social security pension;

"*(b)* medical benefits."

Section 13 provides that in consideration of the foregoing rights of citizenship "it shall be the duty of every citizen of "Alberta to discharge faithfully his responsibilities as an "elector and citizen" to observe the law, respect the rights of other citizens, and "to exercise his initiative and enterprise "in promoting the spiritual, cultural and material welfare of "the Province." There is nothing in the Act to indicate what is to happen to a citizen who does not do his duty in these respects. Lastly, in Part I, comes s. 14, according to which the Lieutenant-Governor in Council may make orders to define gainful employment, may enter into agreements with any other Province or with the Dominion for the purpose of carrying out the intent and purpose of this Act, and may make rules and regulations governing the determination of any question which may arise under Part I.

1947 A.C. p. 513.

Part II of the Act, which has the heading "Constitution "and Functions of Board of Credit Commissioners," consists of fourteen clauses, of which the first, s. 15, contains definitions. Of these the following must be specially noted:

"*(a)* 'Alberta Credit Certificates' means certificates "issued to credit institutions authorizing a corresponding "amount of credit deposits and issued in such form and in "such denominations as the Board may specify for the "purposes of carrying into effect the provisions of this Act.

"*(d)* 'Credit' means the monetary evaluation of the "capacity of the people of the Province to produce and "distribute goods and services as when and where required.

"*(e)* 'Credit deposits' means deposits of credit which "have been made available to persons as claims on goods "and services and in respect of which credit institutions "have no corresponding reserve of currency.

"*(f)* 'Credit Institution' means any person, corporation "or organization whose main business is dealing in credit "by keeping accounts of customers' credit deposits, "transferring credit deposits from the account of any "customer to any other person, exchanging credit deposits

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"for currency or making credit deposits available to "customers; but shall not include any person, corporation "or organization whose main business is the production "or distribution of goods or the rendering of any service "to the public which is not concerned mainly or exclusively "with dealing in credit deposits; and likewise shall not "include the Bank of Canada or credit unions operating "pursuant to The Credit Union Act."

Their Lordships would observe that the definition of "credit "institution" does not, in terms, include banks, but, while "credit institution" is a wider term, it is obvious (and is not disputed) that chartered banks are included, i.e., banks created by or under legislation of the Dominion, while the final words of the definition exclude the Bank of Canada.

1947 A.C. p. 514.

Section 16 provides for the setting up of the Board of Credit Commissioners, and s. 17, sub-s. 1, purports to confer on the Board authority to license all credit institutions in the Province. There is nothing in the Act to suggest that the Board must license chartered banks operating within Alberta, and it follows that the enactment purports to confer on the Board the right to refuse such a licence. Subsection 3 of s. 17 authorizes, on summary conviction, a penalty of not less than $1,000 and not more than $5,000 for each day that a credit institution which has not obtained a licence carries on its operations, and sub-s. 4 adds the additional consequence that the Board or its agents, with the approval of the Lieutenant-Governor in Council, "may enter "the premises of such institution and assume full control "and management of its business on behalf of its directors "and shareholders." There follows a proviso which, in the view of their Lordships, is a proviso to sub-s. 4 alone. It runs as follows: "Provided, however, that nothing herein "contained shall be deemed to empower the Board to take "over or interfere with any operations which the credit "institution is authorized to perform by virtue of the pro-"visions of The Bank Act nor to impair in any way the "deposits any person may have with the credit institution, "nor to interfere with any such person in dealing with his "deposits in any way he may deem proper."

Section 18 requires the Board to establish what is called a capital assets account of Alberta, which is to include "an "estimated valuation of the economic resources of the

"Province" as therein defined, and s. 19 requires the Board to establish a consolidated credit adjustment fund to which the Board shall issue credit deposits "in such amounts as "may from time to time be required as a reserve for provid- "ing an adequate volume of credit deposits to finance the "production and distribution of goods and services within "the Province and for maintaining a balance between the "aggregate purchasing power of the people of the Province "and the estimated collective prices of goods for sale within "the Province and for providing for their equitable distribu- "tion, having due regard to all the factors involved." There follows s. 20, according to which the Board is to transfer to the general revenue account of the Province "such amounts "of credit deposits and in such manner as may be required" for the payment of social security pensions and other benefits therein set out. Sub-section 2 of s. 20 must be set out verbatim. Its text is as follows: "For the purpose of effectively "controlling and regulating the issue and withdrawal of "credit deposits within the Province, the Board, with the "approval of the Lieutenant-Governor in Council, shall "issue to licensed credit institutions Alberta Credit Certi- "ficates in such amounts and on such terms as the Board "may deem advisable in order to enable such credit institu- "tions to issue credit deposits to customers over and above "the deposits against which a reserve of currency is held, "and the amount of Alberta Credit Certificates so issued "shall be debited to the Consolidated Credit Adjustment "Fund." Their Lordships call attention to the phrase, "licensed credit institutions" in this sub-section, as clearly indicating that the enactment purports to confer on a provincial authority power either to grant or to withhold the issue of credit certificates to any chartered bank and thus to restrain any bank from creating an expansion of credit by loans exceeding its reserve of currency.

1947 A.C. p. 515.

Section 24 is of special importance, and, indeed, contains the essence of the scheme requiring the deposits of the banks to be backed to the extent of 100 per cent. by currency or by the proposed credit certificates. The section must be set out in full: "24.—(1.) Every licensed credit institution shall "keep and operate the accounts of its customers, and arrange "for the transfer of credit deposits from one account to "another account in such manner and by such instruments "as the Board may from time to time direct and the Board

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"and its duly authorized agents shall at all times have "access to the books, records and accounts of such credit "institutions, and every member of the Board or its author- "ized agents having access to such records shall take and "be bound by an oath of secrecy properly executed before "a person authorized to administer oaths within the "Province. (2.) The Board may require every licensed "credit institution to hold against all or any credit deposits "of customers, not being deposits against which a reserve "of currency of an equivalent value is held, Alberta Credit "Certificates of an aggregate value not exceeding the "aggregate value of such credit deposits. (3.) In the case "of any credit institution licensed to operate within the Pro- "vince, having branches and operating outside the Province, "the proportion of its reserves of currency to its total deposits "within the Province shall be deemed to be in the same ratio "as its total reserves of currency to its total deposits in "Canada. (4.) The Board may direct that any balance due "by one credit institution to another credit institution on "account of any transfers of credit deposits between their "respective customers shall be settled by the transfer of "Alberta Credit Certificates of a corresponding value."

1947 A.C. p. 516.

Section 26 provides for severe penalties for breach of the provisions of Part II, including the cancellation of the licence of a credit institution, and, in the case of an individual other than a credit institution, a fine not exceeding $1,000, or one year's imprisonment, or both. The final section of the Act runs as follows: "28. This Act shall come into force "on a day fixed for that purpose by Proclamation of the "Lieutenant-Governor in Council, but no such Proclamation "shall be made until after the question of the validity of this "Act has been referred to the Supreme Court of Alberta "pursuant to the provisions of The Constitutional Questions "Act, and it is certified upon any such reference that this "Act is valid, and if no appeal is for the time being pending, "until the time for giving any notice of any such appeal has "elapsed."

Such being the main contents of the Act, their Lordships proceed first to deal with the question of the validity of Part II. They are not, of course, called on to form, or to express, any opinion as to the economic thesis on which what is called social credit is based. Their duty is to examine the enactment itself, without considering what may be its

economic merits or demerits, and to determine, in the first place, whether the Supreme Court of Alberta was right in holding that Part II is ultra vires the legislature of Alberta. It cannot be disputed that the object and effect of Part II are to interfere with and control the business carried on by a chartered bank in the Province by which (subject to any restrictions imposed by Dominion legislation) it makes loans to customers to a total amount which exceeds the liquid assets which the bank holds. The question, therefore, is whether operations of this sort fall within the connotation of "banking" as that word is used in s. 91 of the British North America Act. Their Lordships entertain no doubt that such operations are covered by the term "banking" in s. 91. The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act. To take what may seem a frivolous analogy, if "skating" was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature. Other illustrations may be drawn from s. 91 as it stands: take, for example, head 5, "Postal Services." In 1867 postal services in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of aeroplanes for carrying mail is, on that account, not within the phrase. The concept of banking certainly includes the granting of credit by banks; "a banker," as Duff C.J. said in dealing with the *Alberta Legislation Reference* (1) "has been defined as 'a dealer in " 'credit."' " Whether the expansion of credit now effected by bankers' advances is regarded as wise or unwise, as just or unjust, as economically desirable or economically unjustifiable, does not, in the view of their Lordships, affect the point here at issue at all. If it is fairly included within the conception of "banking" it is a matter exclusively reserved for the legislature of Canada.

1947 A.C. [p. 517.]

In the well-known decision of the Privy Council in *Tennant* v. *Union Bank of Canada* (2), Lord Watson laid it down that

(1) [1938] S. C. R. (Can.) 100, 116.

(2) [1894] A. C. 31, 46.

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the head "banking" was an expression "wide enough to "embrace every transaction coming within the legitimate "business of a banker." He further said that, notwithstanding that "Property and civil rights" was a topic allocated to provincial legislatures under s. 92, "banking" was one of the matters concerning which the exclusive legislative authority of the Parliament of Canada could not be operated without interfering with and modifying civil rights in the Province. This view of the width of the expression "banking" has been recently confirmed by another decision of this Board, in *Attorney-General for Canada* v. *Attorney-General for Quebec* (1). Undoubtedly the business of banking has developed and expanded greatly since Confederation, though it is by no means clear that even before 1867 banks in Canada were not practising to a more limited extent the kind of operation which it is the object of the Alberta Act now under consideration to prevent or restrict. Harvey C.J. points out that as early as 1859 the legislature of the then Province of Canada was enacting (s. 1 of c. 55 of the Consolidated Statutes of that year): "The business of banking shall, for the purposes "of this Act, mean the making and issuing of Bank Notes, "the dealing in gold and silver bullion and exchange, "discounting of promissory notes, bills and negotiable "securities, and such other trade as belongs legitimately to "the business of banking." Moreover, s. 85 of that Act provided that "the total liabilities of any Joint Stock Bank "shall never exceed three times the amount of its capital"—a provision which sets some limit to bank lending, but not a limit measured by the currency which the bank holds. But in any event, it appears to their Lordships to be impossible to hold that it is beyond the business covered by the word "banking" to make loans which involve an expansion of credit. Legislation which aims at restricting or controlling this practice must be beyond the powers of a provincial legislature. It is true, of course, that in one aspect provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the "pith and substance" of the legislation is "banking" (the phrase "pith and substance" can be traced back to Lord Watson's judgment in *Union Colliery Company of British Columbia* v. *Bryden* (2)), this is the aspect that matters and

1947 A.C. p. 518.

(1) Ante p. 33 (A.C.).

(2) [1899] A. C. 580.

Part II is beyond the powers of the Alberta legislature to enact.

There remains the second question, whether when Part II has been struck out from the Act as invalid what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is intra vires "either in whole or in part," but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all. Harvey C.J. dealt with the second question very briefly and answered it by merely saying that Part I is intra vires. Their Lordships, as just explained, think that notwithstanding the form of the question put, the matter cannot be disposed of so summarily. 1947 A.C. p. 519.

Looking at the Act as a whole, it is clear that its intent and purpose is to establish machinery sufficiently complete in itself to secure that, in accordance with the economic concept of social credit, it will severely restrict chartered banks from continuing to carry on a legitimate part of their present operations. When Part II is cut out, what is left? In the first place, there is left the preamble, some of the later paragraphs of which would have little or no application to Part I standing alone. The sixth paragraph, as already pointed out, when reciting that the discharge of the Province's responsibilities necessitates an achievement of two results, is, as to the second suggested result, plainly pointing to Part II. Again, the definition of "social security pension," as meaning the payment to individuals "as herein "provided," of claims on goods and services, etc., within the limitations there indicated, is anticipating and pointing to provisions in Part II, such as s. 15 *(e)* and s. 18, sub-s. 1. Their Lordships have already indicated that they cannot suppose that ss. 3 to 8 in Part I are other than preliminaries to

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what follows, and while it is true that ss. 9 to 12 include a declaration that citizens of Alberta in certain circumstances are entitled to social security pensions, these declarations remain mere aspirations unless Part II operates to provide how this is to be done. The Attorney-General for Alberta ingeniously argued that Part II was only one method of securing these results, and that Part I standing alone left it in the power of the Lieutenant-Governor in Council to make the necessary provisions "by order" in some other undefined and unascertained form; but, in their Lordships' opinion, this is not the scheme of the Act, nor do the words in s. 14 empower the Lieutenant-Governor in Council to make new machinery which will take the place of Part II. The whole thing hangs together, and if Part II goes there is nothing left to be added to the statute law of Alberta which would have any effective operation. The view which their Lordships have formed is confirmed by the language of s. 28, which shows that the Act cannot come into force unless "it is certified . . . . that this Act is valid," etc. Since Part II is invalid, there cannot be a certificate that "this Act" is valid, and thus by the terms of the Act itself, the Act cannot ever come into force. For these reasons their Lordships do not find it possible to agree with the Supreme Court of Alberta that, when Part II has gone, there is yet some part of the Act which survives.

1947 A.C. p. 520.

Their Lordships will humbly advise His Majesty that Part II of the Act is ultra vires and that, having regard to the relation between Part II and the rest of the Act, the Act as a whole cannot be regarded as valid.

Solicitors for the Attorney-General for Alberta: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Canadian Bankers' Association: *Lawrence Jones & Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Before LORDS PORTER, SIMONDS, OAKSEY, MORTON OF HENRYTON and MACDERMOTT

In re The Trade Union Act, 1944, Saskatchewan

1948

2 W.W.R. p. 1055.

LABOUR RELATIONS BOARD OF SASKATCHEWAN..... (APPELLANT);

v.

JOHN EAST IRON WORKS LIMITED.. (RESPONDENT);

AND

ATTORNEYS-GENERAL OF CANADA, SASKATCHEWAN, ONTARIO AND NOVA SCOTIA..... (INTERVENERS).

Constitutional Law—Administration of Justice—SS. 96-100, B.N.A. Act—Trade Union Act, 1944, Sask.—Validity of Provisions Establishing Labour Relations Board—Whether Board a Superior, District or County Court or Tribunal Analogous Thereto.

The question whether a provincial Act which establishes such a board as the Labour Relations Board of Saskatchewan and empowers it to make orders is *ultra vires* on the ground that it is contrary to secs. 96-100 of the *British North America Act, 1867*, cannot be solved by answering the question whether in certain of its functions the board exercises judicial power. It may do so and yet have constitutional validity. For, whatever doubts may at one time have been entertained, two propositions cannot now be challenged—(1) That it is not only courts which are designated "Superior" or "District" or "County" Courts that are within the ambit of said sections; (2) That not all tribunals which exercise judicial power are within their ambit.

The question for determination is therefore a double one—(*a*) Whether the board exercises judicial power; and (*b*) If so, whether in that exercise it is a tribunal analogous to a Superior, District or County Court.

The jurisdiction exercisable by said board is not such as to constitute it a Superior, District or County Court within the ambit of said sec. 96 or a tribunal analogous thereto. *Reference re The Adoption Act of Ontario* [1938] SCR 398, 1 Abr Con 1037, 1444, approved, and adopted so far as it is relevant to the present appeal.

It is not a correct interpretation of *Martineau v. Montreal (City)* [1932] 1 WWR 302 (P.C.), 1 Abr Con 1039, to make it the basis for the proposition that it is incompetent for a provincial legislature to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions. *Adoption Act Reference, supra*, agreed with.

[Note up with 1 CED (CS) *Constitutional Law*, sec. 39; *Courts*, sec. 2; 3 CED (CS) *Public Authorities, Etc.*, sec. 18B.; *Trades and Trade Unions*, sec. 7A (as new section).]

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Appeal from the judgment of the Court of Appeal of Saskatchewan ([1948] 1 WWR 81). Appeal allowed, on the constitutional issues, and case remitted to the Court of Appeal for rehearing on the footing that the Act is not *ultra vires* and that the Labour Relations Board of Saskatchewan and its members are constitutionally established and appointed. The respondent ordered to pay the board's costs of this appeal and in the Court of Appeal, but in the latter court only so far as they relate to the constitutional issues.

M. C. Shumiatcher, K.C., and *F. A. Brewin*, for appellant.

E. C. Leslie, K.C., and *F. Gahan*, for respondent.

B. MacKenna, for Attorney-General of Canada.

C. R. Magone, K.C., for Attorney-General of Ontario.

Hon. L. D. Currie, K.C., Attorney-General, and *T. D. MacDonald, K.C.*, for Attorney-General of Nova Scotia.

F. A. Brewin, for Attorney-General of Saskatchewan.

October 13, 1948.

The judgment of their Lordships was delivered by

LORD SIMONDS. — In this appeal, which is brought from a judgment of the Court of Appeal for Saskatchewan ([1948] 1 WWR 81) a question of constitutional importance is raised whether certain provisions of *The Trade Union Act*, 1944, 2nd sess., ch. 69, of the province of Saskatchewan, which will be referred to as "the Act" are within the legislative powers of that province under the *British North America Act, 1867*.

The facts of the case upon which the question arises are not in dispute and can be shortly stated.

On May 15, 1947, the respondent, John East Iron Works Limited, which carries on business in Saskatchewan, dismissed from its employment six of its employees. Thereupon the United Steel Workers of America, a trade union, complaining that the respondent in dismissing these employees had been guilty of an unfair labour practice within the meaning of sec. 8 (1) (*e*) of the Act, applied to the appellant, the Labour Relations Board of Saskatchewan, for orders requiring the respondent to reinstate them and

to pay them the monetary loss suffered by them by reason of their dismissal. On June 10, 11 and 12, 1947, the union's applications were heard by the appellant board and in the course of the hearing the application in respect of one of the six employees was withdrawn. Both the union and the respondent appeared by counsel before the appellant board and called evidence. The appellant board, having heard evidence and argument, found that the respondent had discriminated "against each of the five employees in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization (the applicant trade union)" and had discharged them contrary to the provisions of the Act.

On July 8, 1947, the appellant board issued orders requiring the respondent to reinstate each of the five employees and to pay each of them the sum of $200.80, being the sum which each of them would have received for his services if he had remained in the employment of the respondent continuously from May 23, 1947 (up to which date he had been paid) until the date of that decision.

On November 6, 1947, the respondent filed a notice of motion in the Court of Appeal for Saskatchewan giving notice of intention to move the court for an order quashing the orders of the appellant board. The notice stated six grounds of application of which only one has been considered by the Court of Appeal and by their Lordships. That ground is that the Act in so far as it purports (*a*) to make orders of the appellant board enforceable as orders of the Court of King's Bench and (*b*) to give to the appellant board the power to make any order under sec. 5 (*e*) of the Act is "*ultra vires* of the Legislature of Saskatchewan as being legislation setting up a Superior, District or County Court or tribunal analogous thereto, the judges or members of which are not appointed by the Governor-General of Canada in Council and as purporting to confer judicial power upon a body not so appointed."

On December 15, 1947, the Court of Appeal (Martin, C.J.S. and Gordon, MacDonald and Anderson, JJ.A.), upholding this plea, gave judgment quashing the orders of the appellant board. Hence this appeal to His Majesty in Council.

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It is now necessary to recur to the terms of the Act the validity of which is impeached, but before doing so it is proper to recall the salient provisions of the *British North America Act, 1867*. Under that Act, while by sec. 92 there was exclusively reserved to the provincial Legislatures *legislative* power in respect of "(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts," yet by Part VII, entitled "Judicature," the following provisions are made, which must be stated in full:

> "96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> "97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> "98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.
>
> "99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
>
> "100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia, and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."

It is in the application of these sections to the constitution and functions of the appellant board that the problem lies which their Lordships have to determine and they would at the outset emphasize that its solution is not to be found by answering the question whether in certain of its functions the appellant board exercises judicial power. It may do

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so and yet have constitutional validity. For, whatever doubts may at one time have been entertained, two propositions cannot now be challenged—(1) that it is not only courts which are designated "Superior" or "District" or "County" Courts that are within the ambit of the sections that have been cited; (2) that not all tribunals which exercise judicial power are within their ambit. It is this consideration that led the respondent in challenging the orders made by the appellant board to use the expression "a tribunal analogous thereto," thus echoing the language used by Lord Atkin in delivering the opinion of their Lordships in *Toronto (City) v. York (Tp.) and Atty.-Gen. for Ont.* [1938] 1 WWR 452, [1938] AC 415, 107 LJPC 43. The question for determination is therefore, a double one—(*a*) whether the appellant board exercises judicial power and (*b*) if so, whether in that exercise it is a tribunal analogous to a Superior, District or County Court.

The Act, which is ch. 69 of the statutes of Saskatchewan, 1944 (2nd sess.) as amended by ch. 108 of the statutes of 1945, ch. 98 of the statutes of 1946 and ch. 102 of the statutes of 1947, had as its original title "An Act respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers." Herein its purpose is apparent, a purpose, it may be observed, that would have sounded strange to the ears of the Legislature of 1867.

1948 2 W.W.R. p. 1059.

Sec. 2 contains certain definitions of which the following may be noted:

> "1. 'bargaining collectively' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement * * * and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement;
>
> "2. 'board' means the Labour Relations Board constituted by this Act;
>
> "3. 'collective bargaining agreement' means an agreement in writing between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions;
>
> * * *

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"5. 'employee' means any person in the employment of an employer, except any person having authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, and includes any person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere."

There are definitions also of "employer," "employer's agent," "labour organization," "minister" and "trade union" which need not be set out.

Sec. 3 gives employees the right to organize in trade unions and to bargain collectively through representatives of their own choosing and provides that the representatives selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for such purpose shall be the exclusive representatives of all employees in such unit for the purpose of bargaining collectively.

1948 2 W.W.R. p. 1060.

Sec. 4 (which is all-important for the purpose of this appeal) prescribes that there shall be a board to be known as the Labour Relations Board composed of seven members appointed by the Lieutenant-Governor in Council at such salaries or remuneration as he deems fit, that the Lieutenant-Governor in Council shall name a chairman and vice-chairman of the board, and that the members of the board shall be equally representative of organized employees and employers, and, if the Lieutenant-Governor in Council deems it desirable, of the general public. The same section lays down rules of procedure for the board.

Sec. 5 defines the power of the board. It has power to make orders:

"(*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

"(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

"(*c*) requiring an employer to bargain collectively;

"(*d*) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

"(*e*) requiring an employer to reinstate any employee discharged contrary to the provisions of this Act and to pay such employee the monetary loss suffered by reason of such discharge;

"(*f*) requiring an employer to disestablish a company dominated organization;

"(*g*) rescinding or amending any order or decision of the board."

Secs. 6 and 7 give directions as to the mode of ascertaining what trade union represents a majority of employees in an appropriate unit.

Sec. 8 defines in great detail what is an unfair labour practice for (1) an employer or his agent and (2) an employee or any person acting on behalf of a labour organization respectively. It is necessary for the present purpose to refer only to subsec. (1) (*e*) [as amended by 1947, ch. 102, sec. 4 (1)] by which it is made an unfair labour practice for an employer or his agent

"to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act; and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee"

1948 2 W.W.R. p. 1061.

in manner aforesaid.

Sec. 9 provides that a certified copy of any order or decision of the board shall within one week be filed in the office of the registrar of the Court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order.

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Sec. 19 [as amended by 1947, ch. 102, sec. 5] provides (1) that in any application to the court arising out of the failure of any person to comply with the terms of any order filed in pursuance of sec. 9, the court may refer to the board any question as to the compliance or non-compliance of such person or persons with the order of the board and (2) that the application to enforce any order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board and (3) that the board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

Sec. 11 provides for the imposition of penalties on any person who takes part in, aids, abets, counsels or procures any unfair labour practice, sec. 12 for the appointment by the Lieutenant-Governor in Council in certain events of the controller of a business, and sec. 13 for the making of rules and regulations.

Sec. 14 gives to the board and the members thereof the power of a commissioner under *The Public Inquiries Act*, RSS, 1940, ch. 15, with liberty to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.

1948 2 W.W.R. p. 1062.

Finally, sec. 15 enacts that there shall be no appeal from an order or decision of the board under the Act and that the board shall have full power to determine any question of fact necessary to its jurisdiction and that its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatsoever.

Their Lordships have thought it proper to set out in some detail the relevant provisions of the impugned Act inasmuch as upon the question that they must determine it is inevitable

that fine distinctions should be drawn. The borderland in which judicial and administrative functions overlap is a wide one and the boundary is the more difficult to define in the case of a body such as the appellant board, the greater part of whose functions are beyond doubt in the administrative sphere. Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one court is "analogous" to another.

The question for determination has been stated as a double one. And so logically it is. For it should first be asked whether the appellant board when it makes an order under sec. 5 (*e*) of the Act is exercising judicial power. If it is not, then it is not a court at all and cannot be a "Superior, District or County Court," or a court analogous thereto.

Their Lordships, however, think it unnecessary finally to answer this question. Without attempting to give a comprehensive definition of judicial power, they accept the view that its broad features are accurately stated in that part of the judgment of Griffith, C.J. in *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead & Co.* (1908) 8 Comm LR 330, at 357, which was approved by this Board in *Shell Co. of Australia Ltd. v. Federal Commr. of Taxation* [1931] 2 WWR 231, [1931] AC 275, 100 LJPC 55. Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.

1948
2 W.W.R.
p. 1063.

Whether in the present case the power exercised by the appellant board under sec. 5 (*e*) of the Act is a judicial power, their Lordships do not decide. For the elements in its constitution and functions which at least make it doubtful whether it is in strict sense a court exercising judicial power at all appear to lead conclusively to the opinion that it is not a Superior, District or County Court or a court analogous thereto.

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It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a court may be seen in the functions of the appellant board. For, as the Act contemplates and the rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the board for an order to be made (*a*) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice, (*b*) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (*c*) requiring an employer to disestablish a company-dominated organization or (*d*) requiring two or more of the said things to be done. Other rules provide for the discharge by the board of other functions. It is sufficient to refer only to (*b*) *Supra*, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a "*lis*" and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of Confederation occupied the Superior or District or County Courts of Upper Canada.

1948 2 W.W.R. p. 1064.

In the Court of Appeal for Saskatchewan the learned Chief Justice (in whose opinion the other judges concurred) accepted the view that the board exercised a judicial power analogous to that of the courts named on the ground that such courts always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof. But, as their Lordships think, this

view ignores the wider aspects of the matter. The jurisdiction of the board under sec. 5 (*e*) is not invoked by the employee for the enforcement of his contractual rights; those, whatever they may be, he can assert elsewhere. But his reinstatement, which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the courts of 1867.

This matter may be tested in another way. If the appellant board is a court analogous to the superior and other courts mentioned in sec. 96 of the *British North America Act, 1867*, its members must not only be appointed by the Governor-General but must be chosen from the Bar of Saskatchewan. It is legitimate therefore to ask whether, if trade unions had in 1867 been recognized by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by sec. 4 of the Act. It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts. And it appears to their Lordships that to this question only one answer can be given. For wide experience has shown that, though an independent president of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems. The members of the board are to be equally representative of organized employees and employers and in a certain event of the general public. That does not mean that bias or interest will lead them to act otherwise

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than judicially, so far as that word connotes a standard of conduct, but it assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the courts mentioned in sec. 96.

It is relevant too to consider the alleged judicial function of the board under sec. 5 (*e*) of the Act in relation to its other duties. It is not impossible, as *Toronto (City) v. York (Tp.) and Atty.-Gen. for Ont.*, *supra*, illustrates, for a body to be validly established for administrative purposes and yet to be unconstitutionally clothed with a judicial power. It is not therefore conclusive of the constitutionality of the board that in the main it is an administrative instrument and that its judicial function is designed to implement administrative policy. But, once more seeking an analogy with the courts mentioned in sec. 96, their Lordships must observe that the feature of the board's constitution, which is conspicuously shown in the power vested in it by sec. 10 (3) of the Act to appeal in its own name from any judgment of any court affecting any of its orders or decisions, emphasizes the dissimilarity from those courts.

On behalf of the respondent stress was laid upon the provisions of sec. 15 of the Act. It was urged that a tribunal, whose decisions were not subject to appeal and whose proceedings were not reviewable by any court of law or by any *certiorari* or other proceeding whatsoever, must be regarded as a "Superior" court or a court analogous thereto. But the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court. It does not for that reason become itself a "Superior" court. Nor must its immunity from *certiorari* or other proceedings be pressed too far. It does not fall to their Lordships upon the present appeal to determine the scope of that provision but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act.

1948 2 W.W.R. p. 1066.

At this stage their Lordships reach the conclusion that the jurisdiction exercisable by the board is not such as to constitute it a court within sec. 96 of the *British North America*

Act, 1867. They do not think it necessary to consider whether it is a jurisdiction more nearly analogous to that exercised at the time of Confederation by justices of the peace—a matter to which much argument was directed—nor would they pursue the comparison with the jurisdiction of the Workmen's Compensation Board, which was also pressed upon them by counsel. It is sufficient to say that it is not in their opinion analogous to that of a Superior, District or County Court.

But before parting with the case their Lordships think it proper to observe upon two cases which have recently come before them, *Martineau & Sons v. Montreal (City)* [1932] 1 WWR 302, [1932] AC 113, 101 LJPC 49, and *Toronto (City) v. York (Tp.) and Atty.-Gen. for Ont., supra*, of which passing mention has already been made, and more particularly also upon *Reference re Adoption Act of Ontario* [1938] SCR 398, 71 CCC 110, in which will be found a judgment of Sir Lyman Duff, lately Chief Justice of Canada, so exhaustive and penetrating both in historical retrospect and in analysis of this topic that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal.

In *Martineau's* case, *supra*, where the question was as to the constitutionality of the Quebec Public Service Commission in that its members exercised certain judicial functions but were not appointed by the Governor-General, it would appear that the decision of this Board in favour of the validity of the awards made by the Commission was largely determined by the fact that this Commission was itself the successor of a body which was in existence at the date of Confederation and then exercised a similar jurisdiction. Apart therefore from any other consideration its constitutionality appeared to be preserved by sec. 129 of the *British North America Act, 1867*. But in the course of delivering the judgment of the Board Lord Blanesburgh, referring to a decision of Drake, J. in a British Columbia case, *Burk v. Tunstall* (1890) 2 BCR 12, approved the following words used by that learned judge:

> "* * * but in the section itself, after the special Courts thus named, the Courts of Probate in Nova Scotia

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and New Brunswick are excepted from the operation of the clause, thus showing that section 96 was intended to be general in its operation."

It appears from cases cited upon the present appeal and from the judgment of Duff, C.J.C. in *Reference re the Adoption Act of Ontario, supra,* that this passage has been made the basis for the proposition that it is incompetent for provincial Legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions. Their Lordships agree with the learned Chief Justice in thinking that this is a wholly unwarranted view of *Martineau's* case, which was directed neither to courts of summary jurisdiction of any kind nor to tribunals established for the exercise of jurisdiction of a kind unknown in 1867.

In *Toronto (City) v. York (Tp.) and Atty.-Gen. for Ont., supra,* it was decided that the Ontario Municipal Board was primarily an administrative body but that certain sections of the Act by which it was established purported to clothe it with the functions of a court and to vest in it judicial powers and that *pro tanto,* since its members were not appointed by the Governor-General, the Act was invalid. But it is clear that in that case the question did not arise for argument, as it arises in the case under appeal, whether, upon the assumption that judicial power was vested in the board, the board was thereby brought within the ambit of sec. 96. It is true that at an early stage in the judgment delivered by Lord Atkin the question was asked "Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto?" But it seems to have been assumed by their Lordships that if the power vested in it was judicial, it was such a tribunal, for (as Duff, C.J.C. pointed out in the case cited) it is obvious that their Lordships did not consider, because presumably there was no occasion to do so, the distinction between the courts that come within the intendment of sec. 96 of the *British North America Act, 1867,* and other courts and tribunals.

Finally, in *In re the Adoption Act of Ontario, supra,* it fell to the Supreme Court of Canada to determine the

constitutionality of a number of Acts which beyond question purported to vest judicial power in various judicial officers to be designated by the Lieutenant-Governor in Council. In point of substantive law the subject-matter of these Acts lay within the legislative power of the provinces just as does the subject-matter of the present appeal. The question then was whether the judicial bodies thus established were courts within the intendment of sec. 96, and the answer was in the negative. It was sufficient for the purpose of that case for the learned Chief Justice to pose this question: "Does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96?" and, answering that question in the affirmative, to pronounce for the validity of the statutes. And, if in this case the same alternative was presented to their Lordships, they might well answer it in the same way, for at least from the earliest times the administrative and judicial duties of justices of the peace have been curiously blended; that feature a court of summary jurisdiction has in common with the appellant board. But they would prefer to put the question in another way, which may be more helpful in the decisions of similar issues, viz., "Does the jurisdiction conferred by the Act upon the appellant board broadly conform to the type of jurisdiction exercised by the Superior, District or County Courts?" In their view, for the reasons already stated, it does not do so. They do not think it necessary to say whether it conforms more nearly to any other jurisdiction existing in 1867.

Their Lordships conclude that the judgment of the Court of Appeal for Saskatchewan cannot be maintained. But that does not end the matter. For apart from the plea of unconstitutionality of the Act the respondent claimed to have the orders of the appellant board quashed on two other grounds (*a*) that in their assessment of the monetary loss suffered by the discharged employees the board proceeded upon an error in law so fundamental as to deprive the board of jurisdiction, and (*b*) that the conduct of the chairman of the board disqualified him by bias or the reasonable apprehension of bias from taking part in the inquiry and the board as constituted at the hearing was thereby also disqualified. The Court of Appeal, being in favour of the respondent on

P.C. 1948

IN RE TRADE UNION ACT, 1944 SASK.

LABOUR RELATIONS BOARD v. JOHN EAST IRON WORKS LTD.

Lord Simonds

the constitutional plea, did not think it necessary to consider these grounds and their Lordships are not prepared to do so until at least the Court of Appeal has pronounced upon them. Therefore, while the present appeal must be allowed, the case must be remitted to the Court of Appeal for rehearing upon the footing that the Act is not *ultra vires* and that the board and its members are constitutionally established. Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs of the appellant board of this appeal and in the Court of Appeal of Saskatchewan but in the latter court only so far as they may relate to the constitutional issues.

[PRIVY COUNCIL.]

J.C.* 1946 Oct. 10.

1947 A.C. p. 24.

TREASURER OF ONTARIO.....APPELLANT;

AND

BLONDE AND OTHERS.....RESPONDENTS.

TREASURER OF ONTARIO.....APPELLANT;

AND

ABERDEIN AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Revenue—Succession duty—Company shares—Situs—Alternative places of transfer—Selection on rational grounds—Not "property situate in Ontario"—Succession Duty Act, 1934, *c.* 55, *(Ontario), s.* 6, *sub-s.* 1—*Succession Duty Act*, 1939 *(2nd Session), c.* 1 *(Ontario), s.* 5.

The adoption of the place of transfer of registered shares in a company as the leading consideration in determining the situs of the shares for the purposes of death duties involves the corollary that, if there be, outside the jurisdiction in which it is suggested that the shares are situate, several places where transfers can be effectively carried through in the ordinary course of business, and there is no place within the jurisdiction where a transfer can be carried through, the shares cannot be situate within the jurisdiction. Where, therefore, shares owned by a testator in two companies incorporated under the law of the State of Michigan, U.S.A., could only be transferred in Michigan and New York in the ordinary course of business, and could not be transferred within Ontario at all, they were not "property situate in Ontario" within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario, and the domicile of the testator in Ontario at the date of his death, the grant of probate there and the presence in Ontario of the share certificates—which had not been endorsed in blank or otherwise—were irrelevant. 1947 A.C. p. 25.

If there are two places where shares can be effectively transferred, one within and the other outside the jurisdiction, a selection of one of the alternative places as the place of transfer for the shares should, if possible, be made on rational grounds. Where, therefore, a testator owned shares, in two companies incorporated respectively under the Canadian and the Ontario Companies Acts, which could be transferred either in New York, U.S.A., or Toronto, Ontario, and died domiciled and resident in Massachussets, where all the share certificates were—none of which had been endorsed in blank or otherwise by the testator—and probate in Ontario was not necessary to enable the executors to be registered on the New York register, in substance for transfer purposes New York occupied the field, and, without leaving the region of transfer, there was sufficient ground to enable a selection to be made between New York and Ontario, and the shares were not, according to the law of Ontario, situate in Ontario.

**Present:*—VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

J.C. 1946

TREASURER OF ONTARIO v. BLONDE AND TREASURER OF ONTARIO v. ABERDEIN.

Principle in *Rex* v. *Williams* [1942] A. C. 541, applied.

Judgments of the Court of Appeal for Ontario [1941] O.R. 227, a 236, and [1945] O.R. 206, at 213, affirmed.

APPEALS (No. 43 of 1941 and No. 3 of 1946), the first from a judgment of the Court of Appeal for Ontario (June 24, 1941) reversing a judgment of Rose C.J. (February 19, 1941) on a special case stated, the second from so much of the judgment of the Court of Appeal for Ontario (February 16, 1945) as affirmed a judgment of Kelly J. (May 27, 1944).

The following facts are taken from the judgment of the Judicial Committee. In the first appeal, *Treasurer of Ontario* v. *Frances Eugenia Blonde and Others*, the testator, A. T. Montreuil, at the date of his death on October 2, 1936, was the registered owner of certain fully paid shares in the capital stock of Briggs Manufacturing Co. and Pfeiffer Brewing Co. Each of those companies was incorporated under the law of the State of Michigan, U.S.A., and had its head office in Detroit. Each company had duly appointed transfer agents in Michigan and New York and all the shares of each company could be transferred at either place on production of the relative share certificate. No other transfer office was maintained by either company. At the date of his death, the testator was domiciled and resident in Ontario and the share certificates were in his possession in Ontario. None of them had been endorsed in blank or otherwise. Probate of the testator's will was, on October 29, 1936, granted to his executors in Ontario. In those circumstances proceedings were taken by the Treasurer of Ontario to recover succession duty from the executrices of Montreuil's estate pursuant to the Succession Duty Act, 1934, of Ontario. The only point at issue was whether the shares were at the date of the testator's death "property situate in Ontario" within the meaning of s. 6, sub-s. 1, of that Act.

1947 A.C. p. 26.

The Court of Appeal for Ontario (Robertson C.J.O., Middleton, Henderson and Gillanders JJ.A., Masten J.A. dissenting), reversing the trial judge (Rose C.J.) held that the shares were not situate in Ontario. The hearing of the case in Canada and the lodging of the present appeal by the Treasurer took place before the decision of their Lordships of the Judicial Committee in *Rex* v. *Williams* (1).

(1) [1942] A.C. 541.

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In the second appeal, *Treasurer of Ontario* v. *Aberdein and Others*, the testator, J. D. Aberdein, was, at the date of his death on December 11, 1940, the registered owner of certain shares in the capital stock of Dome Mines, Ld. He and his wife were also the joint registered owners with right of survivorship of shares in the capital stock of Nipissing Mines, Ld. Dome Mines, Ld. was incorporated under the Companies Act of Canada, and Nipissing Mines, Ld. was incorporated under the Companies Act of Ontario. The head office of both companies was in Ontario. Under the Ontario Companies Act Nipissing Mines, Ld. was bound to keep a register of members in Ontario. Each company had duly appointed transfer agents in Toronto and in New York, and all the shares of each company could be transferred at the offices of the transfer agents in either place. There was no other place at which transfers could be carried through. At each of the transfer offices the survivor of shares held in two joint names could, by taking the appropriate steps, secure registration in his name. The shares in each company were listed and actively dealt with on the stock exchanges of Toronto and New York. At the date of the death of the testator he and his wife were domiciled and resident in the Commonwealth of Massachussets and all the share certificates were in Massachussets. None of them had been endorsed in blank or otherwise by the testator. In those circumstances proceedings were taken by the Treasurer of Ontario to recover succession duty from the executors of Aberdein's estate and Mrs. Aberdein pursuant to the Succession Duty Act, 1939, of Ontario. Under s. 1 of that Act property passing on the death of the deceased included joint property (subject to an exception here immaterial). The only point at issue was whether the shares in the two companies were at the testator's death "property situate in Ontario" within the meaning of s. 5 of that Act. At the hearing evidence was led as to the law of New York relating to the situs of shares. The broad effect of that evidence was that for the purpose of taxation the shares here in question did not under that law have a situs in New York.

[1947] A.C. p. 27.

The trial judge (Kelly J.) and the Court of Appeal (Robertson C.J.O., Henderson and Gillanders JJ.A.), for the reasons given in their judgments in *The King* v. *The Globe*

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Indemnity Company of Canada (1), held that the shares were not situate in Ontario. Against that decision the Treasurer of Ontario appealed.

1946. June 27, 28. *C. R. Magone K.C.* (of the Canadian Bar) for the appellant in the first appeal, read the judgment of the Board in *Rex* v. *Williams* (2), delivered since this appeal was filed some years ago, and continued: A great deal of emphasis seems to have been placed in that case on the fact that the share certificates were in Buffalo, New York State, and that the executors could not be compelled to part with them. In the present case I am laying emphasis on the fact that the share certificates were in Ontario. Where shares can be effectively dealt with in more than one jurisdiction the places where the certificates are found is the determining factor: *Stern* v. *The Queen* (3), *Attorney-General* v. *Bouwens* (4), *In re Clark* (5) and *In re Aschrott* (6). *Stern's* case (3) may be particularly mentioned as closely resembling the present case. In each of the following Canadian cases it was found that because the certificate was in a Province where there was a transfer office where the shares could be effectively dealt with, that determined the situs: *Re MacFarlane* (7), *Toronto General Trusts* v. *The King* (8), *Rice* v. *The King* (9) and *Ivey* v. *The King* (10). It was said in *Rex* v. *Williams* (11) that "nothing effective "could lawfully be done there [Ontario] without producing "the certificates, and the legal personal representatives in "Buffalo could not be compelled to part with them to enable "the transfers to be effected in Ontario rather than at "Buffalo." It is submitted that unless the certificate is found in the State or Province where the transfer office is the shares cannot have a situs in that State or Province. As in the *Stern* case (3), they could be treated as valuable documents in the hands of the executors. In cases where there are two or more transfer offices in no case can it be found that the situs has been held to be at a place where the certificate was not situated. [Reference was also made to *Lord Sudeley* v. *Attorney-General* (12), *Attorney-General*

1947 A.C. p. 28.

(1) [1945] O.R. 190.
(2) [1942] A.C. 541.
(3) [1896] 1 Q.B. 211.
(4) (1838) 4 M. & W. 171.
(5) [1904] 1 Ch. 294.
(6) [1927] 1 Ch. 313.
(7) [1933] O.R. 44 (C.A.).
(8) [1938] 1 D.L.R. 40.
(9) [1939] 4 D.L.R. 701.
(10) [1939] 1 D.L.R. 631.
(11) [1942] A.C. 541, 560.
(12) [1897] A.C. 11.

v. *Higgins* (1) and *Brassard* v. *Smith* (2)]. Here the certificates were found at the death in Ontario, where the testator was domiciled, and the shares in question could not be transferred on the books of the transfer agents of the companies in Michigan and New York unless the certificates were produced. The Ontario probate gave the executors a right to the possession of the certificates, and they could endorse them for transfer as effectively as could the owner when living. The shares were locally situate in Ontario at the date of death for the purposes of the Succession Duty Act, 1934, and subject to succession duty.

F. K. Jasperson (of the Canadian Bar) for the respondents, was not called on.

June 28, 1946. *C. R. Magone K.C.* for the appellant in the second appeal. The question is the same as in the previous appeal—whether or not the shares were property situate in Ontario at the date of the testator's death. Where shares may at the date of death be effectively transferred in either of two places—here, in the State of New York and in the Province of Ontario—the situs of such shares must be within one place or the other, and the selection must be made on rational grounds: *Rex* v. *Williams* (3). The solution must be the same in this case as it would be if the testator had been domiciled, say in Manitoba, and duplicate transfer offices were in two other provinces of Canada. Domicile has nothing to do with situs: *Rex* v. *Williams* (3), where it was said "their Lordships must reject the notion that the domicile of "the deceased has anything to do with the situs of the "property." On rational grounds, of which there are several which tip the scales in the appellant's favour, the Province of Ontario should be preferred to the State of New York, where there was only a transfer office and nothing else. The situs is in Ontario, where the shares could be dealt with effectively; where the corporate existence of the company depends on Ontario and Canadian Law; where the shareholders and the company receive the protection of Ontario and Canadian law; where the head office of the company is situate, and where winding-up proceedings would take place. The shares in question are property situate in Ontario and are exigible for duty under the Succession Duty Act, 1939.

1947 A.C. p. 29.

(1) (1857) 2 H. & N. 339. (2) [1925] A.C. 371.
(3) [1942] A.C. 541, 554, 560.

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John Jennings K.C. (of the Canadian Bar) for the respondents. The transfer agents in Ontario and New York had equal status. The shares in question were not, and are not, property situate within Ontario: *Re MacFarlane* (1); *Rex* v. *Williams* (2); *The King* v. *The Globe Indemnity Company of Canada* (3), which last is in substance the judgment in the present case. Domicile of the deceased could never by itself be a determining factor on the question of situs, and domicile and the maxim "mobilia sequuntur personam" are only to be taken into account and given such weight as may be fairly credited to them to tip the balance. So far as the record goes, the respondents have no association with Canada, and when it is observed that if they had come into the Province of Ontario to effect transfer they would have rendered themselves liable to two succession duties—Dominion and Ontario—can it be supposed that any businesslike people would have taken such a course and would have subjected the estate to two new taxes? That is a strong reason why the situs should be held to be in that country where the testator was domiciled and resident, where the share certificates were, and where the shares could be effectively dealt with—effectively dealt with in the business sense within the meaning in *Rex* v. *Williams* (2). The executors required no aid from any court or authority in Ontario to effect a transfer into their names or into the names of transferees from the executors: *Rex* v. *Lovitt* (4). There are the distinctions between the facts in *Rex* v. *Williams* (2) and the present case that here none of the share certificates were endorsed in blank or otherwise at the time of the death of the testator, and the testator did not reside in that State of the U.S.A. in which there were agents authorized to transfer the shares in question. The respondents could effectually deal with the shares without coming into Ontario, and could not be compelled to part with them to enable the transfers to be effected in Ontario; in a business sense, the shares at the date of death could have been effectually dealt with in the State of New York, which was the natural place for their transfer.

1947 A.C. p. 30.

C. R. Magone K.C. replied.

(1) [1933] O.R. 44, 48.
(2) [1942] A.C. 541.
(3) [1945] O.R. 190.
(4) [1912] A.C. 212, 225.

October 10. The judgment of their Lordships was delivered by LORD UTHWATT. These appeals from the Court of Appeal for Ontario relate to the question of the situs to be attributed to registered shares in companies for the purposes of the Succession Duty Acts of Ontario. They may be conveniently dealt with together. [His Lordship then stated the facts set out above, and continued:] The authorities which bear on the situs of registered shares were recently reviewed by their Lordships in *Rex* v. *Williams* (1), and it is unnecessary again to review them. It is now settled beyond dispute that for the purpose of death duties a local situation is to be attributed to shares in a company and that (leaving aside the case of "street certificates") the first matter to be ascertained in an inquiry as to the situs of registered shares is the place in which the shares can be effectively dealt with as between the shareholders and the company so that the transferee will become legally entitled to all the rights of a member. The authorities before *Rex* v. *Williams* (1) establish that, if such a place be found within a particular jurisdiction, the shares are situate within that jurisdiction, but in none of those cases was there present the feature that there were two places where the shares could effectively be dealt with, one within and the other outside the jurisdiction. That situation arose in *Rex* v. *Williams* (1), where shares could be transferred indifferently in Toronto, Ontario and in Buffalo, New York. The principle laid down and applied in that case was if it were possible on rational grounds to prefer one of the alternative places to the other as the place of transfer for the shares in question, the selection should be made accordingly.

A just estimation is, in their Lordships' opinion, first to be made of all matters which relate to the transfer of the shares under consideration. If sufficient reason for a choice of one place then appears, the problem is solved. It is only where a solution on these lines is not possible that the need for resort to some other principle for determining situs arises. 1947 A.C. p. 31.

The adoption of place of transfer as the leading consideration in determining locality involves, in their Lordships' view, the corollary that, if there be, outside the jurisdiction in which it is suggested the shares are situate, several places where transfers can be effectively carried through in the ordinary course of business, and there is no place within

(1) [1942] A.C. 541.

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the jurisdiction where a transfer can be carried through, the shares cannot be situate within the jurisdiction. The inquiry at the outset is "Are the shares situate in the jurisdiction or not?" The inability of the jurisdiction to satisfy the test removes it from the arena. The circumstance that alternative places of transfer exist in what happen to be two different states outside the jurisdiction is for the purpose in hand no more relevant than the circumstance that two places of transfer exist in one state outside the jurisdiction.

These considerations are sufficient to dispose of *Blonde's* case. It is clear that the shares could be transferred outside Ontario in the ordinary course of business and could not be transferred within Ontario at all. The shares were therefore not situate in Ontario. The domicile of the testator, grant of probate in Ontario and the presence in Ontario of the share certificates, are irrelevant.

Aberdein's case cannot be disposed of so summarily. Effective transfers were possible both in Ontario and outside Ontario. The other matters bearing on transfer must therefore be considered. In argument two matters were referred to as helping the view that the shares were situate in Ontario. First, it was said that under the law of New York, the shares were not situate in New York. The field was therefore left open for Ontario, and the absence of a competitor, if not conclusive in favour of Ontario as the situs of the shares, at least tipped the scale in its favour. In their Lordships' opinion the view taken by the law of New York as to the situs of the shares is irrelevant. The question at issue is what is the situs according to the law of Ontario, and on that topic the law of New York has no bearing. A situs in New York according to the law of Ontario is consistent with the absence of that situs according to the law of New York. It may be added that it was not suggested that the lack, according to the law of New York, of situs in New York in any way impeded operations on the register of transfers maintained in New York. Secondly, it was suggested, in the case of the shares in the Nipissing Company, that as the Ontario Companies Act required a register of members to be kept in Ontario and the maintenance of a register of members and a transfer office in New York was facultative, primacy should be accorded to the Ontario office. In their Lordships' opinion there is no substance in this point. The

1947] A.C. p. 32.

New York transfer office was no fleeting phantom and, as regards its functions, it stood in all respects on a parity with the Ontario transfer office.

The other features that bear on transfer are that the shares were freely marketable both in New York and in Ontario; that the registered owners were domiciled and resident in Massachussets; that the share certificates were in Massachussets; that probate in Ontario was not necessary in order to enable Aberdein's executors to be registered on the New York register, and that there were clear advantages to executors in choosing New York rather than Ontario as the place of transfer (see *Rex* v. *Globe Indemnity Company of Canada, Ld.* (1)). The common feature of these matters is that none of them points to Ontario, and all point to New York, as the place at which in the ordinary course of affairs the shares would be dealt with by the registered owner. That owner, domiciled and living in Massachussets and with alternative markets open to him, would be little likely when desiring to deal with his shares to choose a market and place of transfer which subjected him to the necessity of transferring the share certificates to a place outside the U.S.A. and of receiving Canadian dollars on a sale. On transmission on death both as regards shares held jointly as well as the shares held by Aberdein solely, New York and not Ontario would in the ordinary course be selected as the place for completing the formalities incident to the new ownership. In substance for transfer purposes New York occupied the field so far as these shares were concerned. Without leaving the region of transfer there is, in their Lordships' view, sufficient ground here (though there is not present, as in *Rex* v. *Williams* (2), any blank endorsement of the certificate) to enable a selection to be made between New York and Ontario. In their Lordships' view the shares were not, according to the law of Ontario, situate in Ontario.

1947 A.C. p. 33.

Their Lordships will humbly advise His Majesty that the appeals in both cases should be dismissed. The appellant in each case will pay the costs of the appeal.

Solicitors for appellant in both appeals: *Blake & Redden.*

Solicitors for respondents in first appeal: *Lawrence Jones & Co.*

Solicitors for respondents in second appeal: *Charles Russell & Co.*

(1) [1945] O.R. 190.

(2) [1942] A.C. 541.

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1948
Nov. 22.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR SASKATCHEWAN ..... } Appellant;

AND

1949 A.C. p. 110.

ATTORNEY-GENERAL FOR CANADA AND OTHERS ..... } Respondents;

AND

ATTORNEY-GENERAL FOR ALBERTA AND ATTORNEY-GENERAL FOR QUEBEC ..... } Pro Forma Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Saskatchewan—Crop failure relief legislation—Limitation of contractual obligations of mortgagors and purchasers of farm land—Constitutional validity—"Interest" legislation—Ultra vires—Farm Security Act, 1944, *c.* 30 *of Statutes of Saskatchewan*, 1944 *(second session) (as amended by s.* 2 *of c.* 28 *of Statutes of Saskatchewan* 1945), *s.* 6—*British North America Act*, 1867 (30 & 31 *Vict., c.* 3), *s.* 91 (19.); *s.* 92 (13.).

The Farm Security Act, 1944, of Saskatchewan, the main object of which was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of there being in any year a "crop "failure" as defined in sub-s. 1 of s. 6, provided in sub-s. 2 of s. 6 that: "(2.) Notwithstanding anything to the contrary, every mortgage and "every agreement of sale shall be deemed to contain a condition that, "in case of crop failure in any year and by reason only of such crop failure:

"1. the mortgagor or purchaser shall not be required to make any "payment of principal to the mortgagee or vendor during the period "of suspension [as defined in sub-s. 1 of s. 6];

"2. payment of any principal which falls due during the period of "suspension and of any principal which thereafter falls due under the "mortgage or agreement of sale shall become automatically postponed "for one year;

"3. the principal outstanding on the fifteenth day of September "in the period of suspension shall on that date become automatically "reduced by four per cent. thereof or by the same percentage thereof as "that at which interest will accrue immediately after the said date on the "principal then outstanding, whichever percentage is the greater; pro-
1949 A.C. p. 111. "vided that, notwithstanding such reduction, interest shall continue "to be chargeable, payable and recoverable as if the principal had not been "so reduced."

Held, that para. 3 of sub-s. 2 of s. 6 of the Farm Security Act, 1944, was ultra vires the Provincial legislature as being an enactment in relation to "interest," a subject-matter within the exclusive legislative competence of the Dominion Parliament under s. 91, head 19, of the British North America Act, 1867. Further, to provide that principal was to be reduced by statute but that the amount to be paid as interest

Present:—Viscount Simon, Lord MacMillan, Lord Simonds, Lord Oaksey and Lord MacDermott.

was to remain unaltered was necessarily to increase the rate on the principal outstanding, and therefore to conflict with s. 2 of the Dominion Interest Act, R. S. C. 1927, c. 102. Secondly, the dealing with interest in para. 3 lay at the heart of the matter and was not merely incidental to the exercise of a valid power to legislate for a modification of principal debts. Lastly, the invalidity of para. 3 involved the consequence that s. 6 was ultra vires as a whole.

Ladore v. *Bennett* [1939] A. C. 468; *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* [1940] A. C. 513, and *Attorney-General for Alberta* v. *Attorney-General for Canada* [1947] *A. C.* 503, referred to.

Judgment of the Supreme Court of Canada [1947] S. C. R. (Can.) 394, affirmed.

APPEAL (No. 99 of 1947), by special leave, from a judgment of the Supreme Court of Canada (May 13, 1947).

The following introductory statement is taken from the judgment of the Judicial Committee. The judgment of the Supreme Court of Canada (Rinfret C.J., Kerwin, Rand and Kellock JJ., Taschereau J. dissenting) answered a question propounded by the Governor-General in Council concerning the constitutional validity of s. 6 of the Farm Security Act, 1944, enacted by the legislature of the Province of Saskatchewan, as amended by s. 2 of c. 28 of the Statutes of Saskatchewan, 1945. There was also a second question, framed on the hypothesis that s. 6 was not ultra vires, and asking whether the section was operative in the case of mortgages securing loans by the Crown in right of Canada and in certain analogous cases. The majority in the Supreme Court held that s. 6 was wholly ultra vires and therefore found it unnecessary to answer the second question. Taschereau J. was of opinion that s. 6 was intra vires, and answered the second question in the negative.

The questions referred by the Governor-General in Council to the Supreme Court for hearing and consideration were formulated as follows:

"1. Is s. 6 of the Farm Security Act, 1944, being c. 30 "of the Statutes of Saskatchewan 1944 (second session) "as amended by s. 2 of c. 28 of the Statutes of Saskat- "chewan 1945, or any of the provisions thereof, ultra vires "of the Legislative Assembly of Saskatchewan either in "whole or in part and if so in what particular or particu- "lars and to what extent?

1949 A.C. p. 112.

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"2. If the said s. 6 is not ultra vires, is it operative "according to its terms in the case of mortgages

"*(a)* securing loans made by His Majesty in right "of Canada either alone or jointly with any other person "under the National Housing Act, 1944, or otherwise;

"*(b)* securing loans made by the Canadian Farm "Loan Board; or

"*(c)* assigned to the Central Mortgage and Housing "Corporation?"

The Farm Security Act, 1944, of Saskatchewan was entitled "An Act for the protection of certain mortgagors, "purchasers and lessees of farm land," and the main object of the Act was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of the yield of grain grown on the land falling below a prescribed minimum. The earlier sections of the Act provided for relief of that nature being granted also to lessees, who rented such land on the terms that the lessor was to receive a share of the crop, but s. 6 was concerned only with the modification of the contractual rights of mortgagees or vendors of farm land in respect of the contractual payments due to them in the event of a "crop failure."

Sub-section 1 of s. 6 defined "crop failure" as meaning a "failure of grain crops grown in any year on mortgaged land "or on land sold under agreement of sale, due to causes "beyond the control of the mortgagor or purchaser, to the "extent that the sum realizable from the said crops is less "than a sum equal to six dollars per acre sown to grain in "such year on such land." The sub-section also contained a definition of the phrase "period of suspension," which meant "the period commencing on the first day of August in the "year in which the crop failure occurs and ending on the "thirty-first day of July in the next succeeding year." Sub-section 2 of s. 6 ran as follows:

"(2.) Notwithstanding anything to the contrary, every "mortgage and every agreement of sale shall be deemed to "contain a condition that, in case of crop failure in any "year and by reason only of such crop failure:

1949 A.C. p. 113.

"1. the mortgagor or purchaser shall not be required "to make any payment of principal to the mortgagee or "vendor during the period of suspension;

"2. payment of any principal which falls due during "the period of suspension and of any principal which "thereafter falls due under the mortgage or agreement "of sale shall become automatically postponed for one "year;

"3. the principal outstanding on the fifteenth day of "September in the period of suspension shall on that date "become automatically reduced by four per cent. thereof "or by the same percentage thereof as that at which "interest will accrue immediately after the said date "on the principal then outstanding, whichever per-"centage is the greater; provided that, notwithstanding "such reduction, interest shall continue to be chargeable, "payable and recoverable as if the principal had not been "so reduced."

The opinion of the majority of the Supreme Court of Canada was that s. 6 was ultra vires as a whole, as being legislation in relation to "interest," a subject-matter within the exclusive legislative competence of the Dominion Parliament under head 19 of s. 91 of the British North America Act, 1867.

1948. July 7, 8, 12, 13, 15 and 16. *F. C. Cronkite K.C.*, *R. S. Meldrum K.C.* and *M. C. Shumiatcher K.C.* (all of the Canadian Bar) for the appellant. The pith and substance of the legislation in question is in relation to "agriculture in the "Province" within s. 95 of the British North America Act, 1867, and is also in pith and substance in relation to "proper-"ty and civil rights in the Province" within head 13 of s. 92 of the Act of 1867; further, it is enacted in relation to a matter of a merely local or private nature in the Province: s. 92, head 16. In reaching the conclusion that the legislation concerns "interest" the Supreme Court has failed to distinguish between the concepts of "affecting" and "in "relation to," that is, a matter which "affects" something is not necessarily "in relation to" it as that expression is used in ss. 91, 92 and 95 of the British North America Act. The words of s. 95 of that Act are that "in each Province "the Legislature may make laws in relation to agriculture in "the Province." The words "in relation to" are also used in s. 92 of the Act. Compared with other activities agriculture occupies a more important position in Saskatchewan than it does in any other province of Canada. It is properly

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described as an agricultural province; there are few secondary industries of any importance: Report of the Royal Commission on Dominion and Provincial Relations vol. 2, p. 100. There are three statutes dealing with this topic which form part of a plan and supplement one another: the Prairie Farm Rehabilitation Act, 1935, of the Dominion, ss. 8, 10; the Land Utilization Act, R.S. Saskatchewan, 1940, c. 192, s. 6; and the Prairie Farm Assistance Act, 1939. With that background, particularly when other similar legislative efforts are considered, it is submitted that Taschereau J. was right when he said: "I have reached the "conclusion that this legislation, being a legislation enacted "for the purpose of dealing with agricultural matters within "the Province of Saskatchewan, is legislation in pith and "substance in relation to agriculture and that it was, "therefore, competently enacted by the Province of Saskat-"chewan" (1). That there is a definite distinction between the concepts of "affecting" and "in relation to" is a matter of general application in constitutional cases in Canada; legislation may affect things, whether "interest" or "property and civil rights," without being in relation to them. What was said in *Attorney-General for Canada* v. *Attorney-General for Ontario* (2) is exactly applicable to the Prairie Farm Assistance Act, and both that Act and s. 6 of the Farm Security Act now in question have the same object, namely, to stabilize the farming industry. Section 6 of the Farm Security Act, 1944, is completely valid legislation "in "relation to" agriculture within the meaning of s. 95 of the Act of 1867.

Turning next to the submission that s. 6 is in pith and substance in relation to "property and civil rights in the "Province" and so within the exclusive legislative competence of the provincial legislature under head 13 of s. 92 of the Act of 1867, *Citizens Insurance Co. of Canada* v. *Parsons* (3) shows that the term "civil rights" is wide enough to embrace rights arising from contract, and also that the Province's legislative jurisdiction over contracts is well established. There can be no doubt with regard to "property"; if it is property legally and factually, and is within the province, it does not require any argument. Analysing the situation here, there can be no more than two rights in-

(1) [1947] S. C. R. (Can.) 402. (2) [1937] A. C. 355.
(3) (1881) 7 App. Cas. 96.

volved, (i.) the right of the vendor or mortgagee, and (ii.) the interest in the land. The only things being dealt with in this legislation are either "property" or "civil rights" geographically situated within the province. It has been decided that a mortgage of land is an interest in land: *Yorkney* v. *Thompson* (1). Further, the effect of s. 2 of the Limitation of Civil Rights Act, R.S.S., 1940, c. 88, has been to confine the rights and remedies of mortgagees and vendors of land to the land itself, situate within the province. There is only one other feature to be mentioned in this connexion, namely, that the right here assumes the form of a specialty, and there are decisions to the effect that the right may follow the situs: *Toronto General Trusts Corporation* v. *The King* (2). *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (3) shows that the traditional interpretation of "property and civil rights" has not been a narrow one. A broad interpretation has been given to that phrase in such cases as *In Re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (4) and *Citizens Insurance Co. of Canada* v. *Parsons* (5), which was followed in a series of cases. In every Province of Canada there are many statutes which essentially do the same thing as is attempted to be done by s. 6 of the Farm Security Act and which have never been questioned: the various Exemption Acts are similar in their operation and effect to s. 6 now in question, in that they directly affect the rights of parties to agreements by extraneously modifying the terms thereof. Of the same effect are the Limitation of Actions Acts, which are a part of the statute law of every jurisdiction based on Anglo-Saxon law. Neither the Exemption Acts nor the Limitation of Actions Acts can be supported as intra vires unless s. 6 here also is.

No matter what s. 6 may be as a whole, it certainly is not "interest" legislation. It is not the form of the statute, but its effect and operation, which are important to a determination of its constitutional validity. When the whole of s. 6 is considered it will be seen that the only occasion on which the cancellation of principal has any real bearing is when the debtor desires to pay sufficient to discharge a mortgage or obtain a transfer under an agreement for sale,

(1) (1914) 50 S. C. R. (Can.) 1.
(2) [1919] A. C. 679, 685.
(3) [1920] A. C. 184, 191-2.
(4) [1922] 1 A. C. 191.
(5) (1881) 7 App. Cas. 96.

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or, at any particular time, to determine the sum due and owing by the debtor to his secured creditor. This follows from the provision that interest is to continue to be chargeable as if the principal had not been reduced. The amount required to pay a mortgage or indebtedness under an agreement for sale is the full amount of the interest owing to the date of payment, having no regard to the provisions of para. 3 of sub-s. 2 of s. 6, together with the full amount of the principal, less the deduction provided for in that paragraph. The amount of the deduction is determined by the following formula: a deduction is made from the principal with respect to each crop failure year occurring in the year 1944 and in every subsequent year, consisting of a percentage of the principal outstanding on September 15 of each crop failure year (after taking into account previous deductions), which is either 4 per cent. or the same percentage as the rate of interest stipulated in the mortgage or agreement, whichever is greater. Thus, it is clear that interest is not dealt with in any way, since the reductions are made exclusively from principal after all the interest contemplated by the parties to the agreement has accrued and fallen due. Even in cases in which no interest is payable under the terms of a mortgage or agreement for sale, or where payments are made on a share-crop basis or by bushelage, the provisions of the section apply, and reductions in principal are accordingly made. It is difficult to contemplate a statute which more specifically excludes the subject of interest from its scope and application.

Section 2 of the Dominion Interest Act, R. S. C. 1927, c. 102, is a permissive section, and there is here no violation of it. *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) explains what is meant by "pith and substance"; and what is really meant is, what in substance was the legislature trying to do? What object was it trying to effect? Looking at s. 6 as a whole, it cannot be said that "interest" in pith and substance was being dealt with; the legislature was quite obviously trying to bring about stability in agriculture. There is, therefore, nothing dealing with interest, but even if there is, it is submitted that it is doing so merely incidentally: *Ladore* v. *Bennett* (2). Lastly, if any parts of s. 6 are beyond the powers of the Province, such parts are merely inoperative and the section is not ultra vires: on the question

(1) [1924] A. C. 328. (2) [1939] A. C. 468.

of severability see *Toronto Corporation* v. *York Corporation* (1) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (2).

J. L. Ilsley K.C. (of the Canadian Bar), *Gahan*, and *D. W. Mundell* (of the Canadian Bar) for the respondent the Attorney-General for Canada. Section 6 is legislation in relation to "interest," a matter within the exclusive legislative authority of the Parliament of Canada under head 19 of s. 91 of the British North America Act. Although the draftsman was attempting to reduce principal, he was really trenching on "interest" in the form of reduction of principal. The purported reduction of principal under para. 3 of sub-s. 2 of s. 6 is merely a colourable device designed to carry out the true object of cancelling, reducing and changing the interest obligation and thus of legislating in relation to interest. In pith and substance this is interest legislation, for if one reduces the capital but maintains the interest quantum then the rate of interest is being affected While in form the section effects a reduction of principal its true purpose and effect is to relieve the mortgagor of a financial obligation equal to the amount of interest he is obliged to pay, or, put colloquially, to cancel the interest. [On the question of pith and substance and colourability reference was made to *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (3); *Ladore* v. *Bennett* (4); *Union Colliery Co. of British Columbia* v. *Bryden* (5); *Attorney-General for Ontario* v. *Reciprocal Insurers* (6); *Attorney-General for Alberta* v. *Attorney-General for Canada* (7) and *Attorney-General for Canada* v. *Attorney-General for the Province of Quebec and Others* (8).] Selection of interest as the yardstick, reduction of the amount payable by the amount of the interest, is not explainable on any other basis than that the burden of which the legislature was trying to relieve the farmer was that of interest. The proviso in para. 3 establishes that no real reduction in principal was intended, for if reduction in principal was all that was intended, interest would thereafter be payable in respect of the reduced principal and there would have been no proviso. The

(1) [1938] A. C. 415.
(2) [1947] A. C. 503, 518.
(3) [1940] A. C. 513, 532-3.
(4) [1939] A. C. 468.
(5) [1899] A. C. 580.
(6) [1924] A. C. 328.
(7) [1939] A .C. 117.
(8) [1947] A. C. 33, 44.

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effect produced is that the aggregate debt is not increased during the period of crop failure by the amount of the interest, but otherwise the debt is not affected. It seems reasonably clear that the true object and purpose of the section is to nullify, under the conditions stated in the section, the obligation to pay interest owing under contracts, and such legislation is beyond the authority of the provincial legislature. As Kerwin J. said, interest is the warp and woof of the enactment.

Next, this is not legislation in relation to agriculture in the province so as to come within the authority of s. 95 of the British North America Act. This is not legislation in relation to agriculture at all, quite apart from whether interest is merely incidental to it. Any legislation which promotes the welfare of farmers makes it more likely that they will stay on the land and stabilize agriculture as an industry: that may be legislation affecting farmers, but it is not legislation affecting agriculture in the sense that the term is used in the British North America Act. It was contended for the appellant that the change in the interest rate which results from this legislation is merely incidental to a scheme which is good as property and civil rights legislation. It is submitted that the right of the Province to legislate on the obligation to pay interest as a civil right is withdrawn from s. 92 of the Act of 1867 because the Province cannot legislate in any way as to a civil right when that civil right falls within s. 91. [Reference was made to the *Lethbridge* case (1), *Ladore* v. *Bennett* (2); *Day* v. *City of Victoria* (3); *John Deere Plow Co., Ld.* v. *Wharton* (4); *Great West Saddlery Co.* v. *The King* (5) and *Burrard Power Co., Ld.* v. *The King* (6), which last case established that provincial legislation otherwise valid as legislation in relation to a matter within the authority of the Province did not apply and was ultra vires as to certain matters falling within the heads of s. 91.] Moreover, the legislation here conflicts with the provisions of the Interest Act, R. S. C. 1927, c. 102, which is legislation validly enacted by the Dominion Parliament: that was not the case in *Ladore* v. *Bennett* (2) and in *Day* v. *City of Victoria* (3). Apart from conflict altogether, when the legislature alters an agreed rate, that alteration cannot be

(1) [1940] A. C. 513, 532-3.
(2) [1939] A. C. 468.
(3) (1938) 3 W. W. R. 161.
(4) [1915] A. C. 330, 340.
(5) [1921] 2 A. C. 91.
(6) [1911] A. C. 87.

said to be incidental, having in mind that the Dominion has legislated in respect of the rate which is payable when there is an agreement. The alteration of the agreed rate is neither incidental to the rest of the scheme nor severable. The interest provision is in relation to a civil right carved out of s. 92 and put into s. 91, and the Province cannot legislate on that civil right. The attempt here is to invade an exclusive Dominion field. The proviso is inseverable: it is inextricably tied up with the rest of the section, and the scheme is entirely altered if the proviso is taken out: *Attorney-General for Alberta* v. *Attorney General for Canada* (1). If any of the provisions of s. 6 might validly be enacted by the provincial legislature they are not severable from those that are beyond the authority of the legislature, and the whole section is therefore ultra vires. Next, s. 6 is legislation in relation to "bankruptcy and insolvency," a matter within the exclusive legislative authority of the Dominion Parliament under head 21 of s. 91; the section also invades the field already occupied by legislation validly enacted by that Parliament, namely, the Bankruptcy Act, the Farmers Creditors Arrangement Act, 1943, and other legislation. Further, s. 6 is ultra vires in so far as it applies to companies incorporated by the Dominion Government under Dominion legislation for the purpose of lending money, because it frustrates and renders impossible the carrying on of the objects for which they are incorporated. Lastly, s. 6 purports to confer the judicial powers of superior or district courts on the Provincial Mediation Board, which is a body not competent to exercise such powers under ss. 96, 99 and 100 of the British North America Act. The application to the board is in the nature of an action for a declaration of the rights of the parties under a statutory agreement which the legislature has written into a mortgage or agreement of sale. The board is under a duty to entertain the application; there must be a hearing, and witnesses may be required or compelled to attend. [On this question of whether the powers of the board were judicial reference was made to *O. Martineau & Sons, Ld.* v. *Montreal City* (2); *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (3) and *Toronto Corporation* v. *York Corporation* (4).]

(1) [1947] A. C. 503, 518.
(2) [1932] A. C. 113, 120.
(3) [1931] A. C. 275, 295-7.
(4) [1938] A. C. 415.

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C. F. H. Carson K.C. and *L. G. Goodenough* (both of the Canadian Bar) for the respondent the Dominion Mortgage and Investments Association. The Dominion Mortgage and Investments Association is an unincorporated association representing twelve loan companies, sixteen trust companies and twenty-five insurance companies. Thirty-four of these companies, including eighteen Dominion incorporated companies, carry on a mortgage business in the Province of Saskatchewan, and had investments in mortgages and agreements for sale secured by farm lands in the Province amounting to about $46,000,000 at the end of 1945. Section 6 discloses a strange legislative scheme, which has no precedent in any other Province of Canada, and would seem to call particularly for the application of the principles stated by Duff C.J. in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) to the effect that one must go behind the form to the substance of the legislation. It is apparent on its face that s. 6 affects in a material way the vital provisions of mortgages and agreements for sale of farm lands. The section purports to write a new contract, a fictional contract, by which the lender is compelled to accept in lieu of his investment what, it is submitted, is a speculation. It is a speculation, first, as to what proportion of the principal amount will be repaid; secondly, it is a speculation as to the amount of payment on account of principal that will be postponed; thirdly, it is a speculation as to the date when the principal as reduced will mature, and lastly, it is a speculation as to the amount of interest that the mortgagee will lose. So far as existing mortgages are concerned, the effect of s. 6, sub-s. 2, is to destroy the vital terms agreed to by the parties and to substitute terms imposed compulsorily by the legislature. So far as the future is concerned, no lending institution would lend money on a mortgage which had imported into it the conditions prescribed by sub-s. 2. The effect of the legislation, so far as the Dominion lending institutions are concerned, is to prohibit them from carrying on in Saskatchewan that business which, by valid Dominion legislation, they have been empowered to carry on in all parts of Canada. The true purpose of s. 6 is to relieve a mortgagor of a financial burden arising out of his mortgage debt to an amount equal to, or substantially equal to, the amount of interest that is payable

(1) [1924] A. C. 328.

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under the mortgage. The object or purpose of the legislation was to scale down substantially the interest on existing farm debts in Saskatchewan, just as in the *Lethbridge* case (1) the object was to scale down substantially the interest on the existing provincial debt in Alberta. It is abundantly clear that the legislation is directed to interest in so many aspects and its operation governs so plainly contractual interest that it must be regarded as legislation in pith and substance in relation to interest and therefore ultra vires. If interest is pulled out of the section the whole structure collapses. If it be right that the section is in pith and substance in relation to interest then it cannot be in pith and substance in relation to agriculture.

1949 A.C. p. 121.

Paragraph 3 of sub-s. 2 of s. 6 is not severable. The legislature has in terms described para. 3 as a condition, and it is submitted, on the assumption that para. 3 is invalid as being in relation to interest, that the deletion of that paragraph or condition written into the contracts would convert a condition in the contract of one character into a condition of a vastly different character. Looking at s. 6 as a whole, it discloses one unitary scheme, and its structure breaks down if there is withdrawn from it what must be regarded as the all-important feature of that single scheme. There was no suggestion in the factum of the Attorney-General for Saskatchewan that anything less than the whole of s. 6 would have been acceptable. [On the question of severability reference was made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (3).] Secondly, while supporting the argument for the Attorney-General for Canada on the question of judicial powers, if it were to be held that sub-ss. 3 and 4 are invalid and must be struck out, then it is submitted that the whole section would be ultra vires. The concluding submission on the whole matter is that para. 3 is in pith and substance interest and cannot be dismembered from that single condition which the legislature has attempted to write into the contract, and on that ground alone the appeal should be dismissed.

Cronkite K.C., replied, and in support of the contention that this was not interest legislation referred to the *Lethbridge*

(1) [1940] A. C. 513. (2) [1937] A. C. 377, 387.
(3) [1947] A. C. 503, 518.

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case (1), *City of Montreal* v. *Attorney-General for Canada* (2) and *City of Halifax* v. *Fairbanks' Estate* (3). With regard to severance, two matters are involved, first, intent, and secondly, whether severance would do violence to the scheme: *Tremblay* v. *Kowhanko* (4); *Attorney-General for Quebec* v. *Slanec & Grimstead* (5). There are two submissions on sub-ss. 3 and 4 of s. 6, first, that the Mediation Board was performing only an administrative function, and secondly, that even if the duties were not administrative, they were not of such a nature as those performed in 1867 by the courts enumerated in s. 96 of the British North America Act: no case has been produced showing that the courts designated by s. 96 did in 1867 perform any such duties as have been assigned to the Mediation Board by sub-ss. 3 and 4: *Polson Iron Works* v. *Munns* (6).

1949 A.C. p. 122.

Nov. 22. The judgment of their Lordships was delivered by VISCOUNT SIMON, who after the introductory statement set out above, continued: In the view which their Lordships take on the constitutional validity of sub-s. 2, and on its relation to the rest of s. 6, it is not necessary to set out the remaining sub-ss. of s. 6, though they have been carefully examined to see if they throw further light on sub-s. 2. The contention of the respondents is that para. 3 of sub-s. 2 is ultra vires of the provincial legislature of Saskatchewan because it is an enactment in relation to "interest"—a matter which, by s. 91, head 19, of the British North America Act is within the exclusive legislative power of the Dominion Parliament. It is further contended by the respondents that the impeached provision conflicts with provisions of the Interest Act of Canada. Reliance was also placed on head 21 of s. 91, which confers on the Dominion Parliament the exclusive power to legislate in relation to "Bankruptcy or Insolvency." On this last point their Lordships would be disposed to agree with Taschereau J. (who alone deals with it) that the respondents' contention is unsound, but the real difficulty in the appellant's way lies elsewhere.

The appellant argues that the "pith and substance" of para. 3 is "property and civil rights," a matter in relation to

(1) [1940] A. C. 513.
(2) [1923] A. C. 136.
(3) [1928] A. C. 117.
(4) (1920) 51 D. L. R. 174, 199.
(5) (1933) 2 D. L. R. 289.
(6) (1915) 24 D. L. R. (S. C.) 19.

which the provincial legislature has an exclusive legislative power, and that in so far as para. 3 affects "interest" it does so only incidentally. In support of this view the Attorney-General for Saskatchewan relies on *Ladore* v. *Bennett* (1), and especially on the concluding passage of Lord Atkin's judgment (2). A further ground on which the appellant contends that the impeached paragraph is intra vires of the Province is that its "pith and substance" is "agriculture in "the Province" within the meaning of s. 95 of the British North America Act, and that it is not repugnant to any Act of the Parliament of Canada such as is referred to in that section.

It is convenient to deal first with this last contention, which provided a chief ground on which the dissenting judgment of Taschereau J. was based. There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand J. points out, there is a distinction between legislation "in relation to" agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters *(Russell* v. *The Queen* (3)). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase "agriculture in the Province" may be construed, and whatever advantages to farmers the re-shaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture.

1949 A.C. p. 123.

A more difficult question is raised by the alternative contention that the legislation is in relation to civil rights in the Province. Contractual rights are, generally speaking,

(1) [1939] A. C. 468. (2) Ibid. 483 (A.C.).
(3) (1882) 7 App. Cas. 829, 840.

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one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to "interest," the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject-matter of "interest" to the Dominion legislature under head 19 of s. 91 of the British North America Act. There is another qualification to the otherwise unrestricted power of the provincial legislature to deal with civil rights in head 18, "Bills of Exchange and Promissory Notes." The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the United Kingdom in 1854 (17 & 18 Vict., c. 90). So restricted a construction was rejected by the Judicial Committee in *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (1) for reasons stated by Viscount Caldecote. The validity of the Interest Act of the Parliament of Canada (R. S. C. 1927, c. 102) has not been challenged in any particular. Section 2 of this statute provides: "Except as otherwise provided by this or by "any other Act of the Parliament of Canada, any person "may stipulate for, allow and exact, on any contract or "agreement whatsoever, any rate of interest or discount "which is agreed upon." It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.

1949 A.C. p. 124.

There thus remain two questions to be considered: first, does the provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenched upon, the subject of interest is not the

(1) [1940] A. C. 513, 530-1.

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pith and substance of the Act? The first of these questions must be answered in the light of an established rule of construction in such cases, namely, that regard must be had to the substance and not to the mere form of the enactment, so that "you cannot do that indirectly which you are prohibited "from doing directly" (per Lord Halsbury in *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1)). If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest. With this rule in mind, their Lordships have examined the language and effect of s. 6 of the Farm Security Act with much care, and they have been greatly assisted in this task by the arguments of counsel on either side. Sub-section 2 of s. 6 provides in effect that, in the event of crop failure, *(a)* the mortgagor or purchaser shall not be required to make any payment of principal during the period of suspension, *(b)* the payment of any principal which is contractually due during that period and any principal which thereafter falls due shall be postponed for one year, *(c)* the principal outstanding on September 15 in the period of suspension shall on that date become automatically reduced by 4 per cent. thereof "or by the same "percentage thereof as that at which interest will accrue "immediately after the said date on the principal then "outstanding, whichever percentage is the greater," but *(d)* notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced.

1949 A.C. p. 125.

It is not in dispute that mortgages or agreements to defer payment of purchase money of land in Saskatchewan, practically without exception, provide for interest on outstanding principal at a rate greater than 4 per cent. per annum. The effect, therefore, is to reduce the outstanding principal, in the event of crop failure, by an amount equal to the amount of interest called for under the contract, but to require this same amount of interest to continue to be paid as though the outstanding principal had not been reduced. If the sub-section had said in plain terms that for the period of suspension there should be no interest charged and that the payment of outstanding principal should be postponed, the result (at any rate in the first year

(1) [1899] A. C. 626, 627.

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of suspension) to the mortgagee or vendor would be the same. Moreover, such agreements normally stipulate for a "rate" of interest on outstanding principal, and a "rate" is the ratio which the sum payable as interest bears to the amount of such outstanding principal. To provide that principal is to be reduced by statute but that the amount to be paid as interest is to remain unaltered is necessarily to increase the rate on the principal outstanding. But provincial legislation which alters a stipulated rate of interest would conflict with s. 2 of the Interest Act. These considerations lead their Lordships to confirm the conclusion at which the majority of the Supreme Court has arrived, that para. 3 of sub-s. 2 of s. 6 trenches upon the Dominion field. It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of their Lordships the endeavour is not successful. This view of the matter renders it unnecessary to determine what would be the correct application of the words used in the difficult situation of successive years of suspension analysed in the judgment of Kellock J.

Secondly, can the remaining argument be upheld that this interference with the topic of interest none the less remains valid because it is merely incidental to the exercise of a valid power to legislate for a modification of principal debts? On this, it is to be observed that there is not only an exclusive power to legislate in relation to interest vested in the Dominion Parliament, but that such legislation has been enacted in the Interest Act. Viscount Maugham laid it down on behalf of this Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), that "Since 1894 it has been a settled proposition that, if a subject of legislation "by the Province is only incidental or ancillary to one of the "classes of subjects enumerated in s. 91, and is properly "within one of the subjects enumerated in s. 92, then "legislation by the Province is competent unless and until "the Dominion Parliament chooses to occupy the field by "legislation." Viscount Maugham's reference to the year 1894 points to the decision of this Board in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). Apart, however, from the obstacle created by the existence of the Dominion Interest Act, their Lordships are unable to take

1949 A.C. p. 126.

(1) [1943] A. C. 356, 370. (2) [1894] A. C. 189.

the view that the dealing with interest is only incidental, for it lies at the heart of the matter. Their Lordships are not called on to discuss, and do not pronounce on, a case where a provincial enactment renders null and void the whole contract to repay money with interest. Here the contracts survive, and once the conclusion is reached that, as Kerwin J. said, "the legislation here in question is definitely in relation "to interest," reliance on such a decision as *Ladore* v. *Bennett* (1) is misplaced. The provincial legislation there considered was legislation in relation to "municipal institu- "tions in the Province," and, as Viscount Caldecote pointed out in the *Lethbridge* case (2): "having come to the conclusion "that the pith and substance of the legislation in question "related to one or more of the classes of subjects under s. 92, "the Board had no difficulty in holding that the regulation "of the interest payable on the debentures of the new City "was not an invasion of Dominion powers under head 19 "of s. 91."

Lastly, does the invalidity of para. 3 involve the consequence that s. 6 is ultra vires as a whole? Their Lordships agree with the Supreme Court that it does, and this view renders it unnecessary to answer the final question posed by the Governor-General in Council. The Board has recently had occasion, in *Attorney-General for Alberta* v. *Attorney-General for Canada* (3) to set out some of the considerations which have to be weighed in deciding whether legislation, a portion of which is found to be ultra vires, is invalid only as to that portion. Applying these tests, it is clear that paras. 1 and 2 of sub-s. 2 of s. 6 are bound up with para. 3 and that sub-s. 2 expresses a single scheme. Subsection 2 in its turn is the main effective provision of s. 6 and thus s. 6 is ultra vires as a whole.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellant: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Dominion Mortgage and Investments Association: *Lawrence Jones & Co.*

(1) [1939] A. C. 468. (2) [1940] A. C. 513, 532
(3) [1947] A. C. 503.

J.C.* 1949 Nov. 2.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR BRITISH COLUMBIA ..... } APPELLANT;

AND

ESQUIMALT AND NAMAIMO RAILWAY COMPANY AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

1950 A.C. p. 87.

Canada—British Columbia—Railway—Construction scheme—Grant of lands—Tax exemption under provincial statute—No contractual relationship between province and railway contractors or railway company—Proposed taxation—Direct land tax—Within provincial legislative competence—Forest protection impost—A "tax" within the exemption provision—Island Railway, Graving Dock and Railway Lands Act, St. B.C., 1884, *c.* 14, *ss.* 8, 22—*Forest Act, R.S.B.C.* 1936, *c.* 102, *s.* 124.

An agreed scheme entered into in 1883 by the Government of British Columbia, the Dominion Government and a group of financiers (the contractors), in connexion with the construction of a railway on Vancouver Island involved, as finally put into operation, that a belt of land on the island through which the railway was to run, belonging to the Crown in right of the province (known as the "island railway belt") was to be vested in the Crown in right of the Dominion, that a company was to be incorporated for the purpose of constructing and operating the railway, and that the island railway belt was to be transferred to it by the Dominion as soon as the construction was satisfactorily completed. In addition the company was to receive from the Dominion a sum in cash by way of further subsidy. To carry the scheme into effect there came into existence, inter alia, first, the Settlement Act of 1883, passed by the provincial legislature, which, after providing in s. 8 for the incorporation of the company, enacted in s. 22 that "The lands to be acquired "by the company from the Dominion Government for the construction "of the railway shall not be subject to taxation, unless and until the "same are used by the company for other than railroad purposes, or "leased, occupied, sold, or alienated"; secondly, a contract, dated August 20, 1883, between the contractors and the Dominion Government for the construction of the railway, under which, inter alia, the island railway belt was to be granted subject in every respect to the provisions of the Settlement Act; and thirdly, a conveyance, dated April 21, 1887, of the island railway belt by the Dominion to the railway company on completion of the railway, subject, among other things, to the Settlement Act.

1950 A.C. p. 88.

The belt of land thus acquired by the railway company comprised valuable timber land. In 1945 a Commissioner who had been appointed to inquire into the forest resources of the province pointed out in his report that the province was receiving no revenue from timber cut on the island railway belt, and he discussed the possibility of imposing (1.) a "severance tax" on such timber cut from such of the land as was sold by the railway company, and (2.) a "fire protection tax" on unalienated land, and in answer to a contention by the railway company that to impose the "severance tax" would be a "breach of the contract between

Present: VISCOUNT SIMON, LORD GREENE, LORD OAKSEY, LORD MORTON OF HENRYTON, and RINFRET C.J. of Canada.

"the province and the railway company" he was of opinion, inter alia, that there was no contract between them. Thereafter, and consequent on the raising of those matters by the Commissioner, a number of questions were referred for the opinion of the court.

Held, first, that there was no contractual relationship between the province and the contractors or the railway company. There was no agreement in contractual form between the province and the contractors and such an agreement could not be inferred from the documents and the acts of the parties. Still less was there a contractual right in the contractors of such a nature as would give them in law a right to complain of breach of contract if legislation diminishing or taking away the tax exemption conferred by s. 22 were to be passed at a later date. As no such contractual relationship as was suggested ever came into existence as between the province and the contractors, it followed that no such relationship could be claimed by the railway company to exist for its benefit by reason of its succession to the rights of the contractors.

Held, secondly, that it was within the competence of the provincial legislature to enact a statute for the imposition of a tax on land of the island railway belt containing provisions substantially as follows: "(*a*) The "tax shall apply only to land in the belt when used by the railway company "for other than railroad purposes, or when leased, occupied, sold, or "alienated; (*b*) when land in the belt is used by the railway company for "other than railroad purposes, or when it is leased, occupied, sold, "or alienated, it shall thereupon be assessed at its fair market value; "(*c*) the owner of such land shall be taxed on the land in a percentage "of the assessed value, and the tax shall be a charge on the land." Even assuming that the timber lands in the belt had no substantial value beyond the value of the timber, the tax proposed was in reality a tax on land and not, as contended by the respondents, a tax on timber, and it was a direct tax.

1950 A.C. p. 89.

Atlantic Smoke Shops v. *Conlon* [1943] A.C. 550, 565 referred to.

Held, thirdly, that the impost for forest protection charged by s. 124 of the Forest Act, R.S.B.C. 1936, c. 102, which provides that from the owners of timber land "there shall be payable and paid to the "Crown . . . . an annual tax at the rate of six cents for each acre," was a tax within the ordinary significance of that word, and not, as contended by the appellants, a "service charge." The tax derogated from the provisions of s. 22 of the Settlement Act, and accordingly the railway company was exempt from payment thereof.

Judgment of the Supreme Court of Canada [1948] S.C.R. 403, affirmed in part and reversed in part.

APPEAL (No. 7 of 1949), by special leave, from a judgment of the Supreme Court of Canada (June 25, 1948) allowing an appeal by the respondents and dismissing a cross-appeal by the appellant from a judgment of the Court of Appeal for British Columbia (June 10, 1947), which had answered seven questions referred to it by an order of the Lieutenant-Governor in Council under the authority of the Constitutional Questions Determination Act, R.S.B.C. 1936, c. 50.

The following facts, and the questions referred, are taken from the judgment of the Judicial Committee: The events leading up to the present controversy were so fully and

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1950 A.C. p. 90.

clearly stated in the judgments of the Canadian courts (1) that not more than a brief outline of them need be given. In the year 1883 an outstanding question between the province of British Columbia and the Dominion of Canada with regard to the construction of a railway on Vancouver Island, originally contemplated as part of the C.P.R. trans-continental route, was finally put to rest by means of an agreed scheme. Three parties were involved in that—the provincial government, the Dominion government, and a group of financiers (called "the contractors") who were prepared to arrange for the construction of the railway. The scheme as it was finally put into operation involved the following main steps. A belt of land on the island through which the railway was to run, belonging to the Crown in right of the province (known as the "island railway belt") was to be vested in the Crown in right of the Dominion. A company was to be incorporated for the purpose of constructing and operating the railway, and the island railway belt was to be transferred to it by the Dominion as soon as the construction was satisfactorily completed. In addition, the company was to receive from the Dominion a sum of cash by way of further subsidy. For the purpose of carrying the scheme into effect a number of what, for convenience, might be called "constituent documents" came into existence. They were shortly as follows:—

(1.) The draft of a bill to be introduced into the provincial legislature the form of which was finally signed as agreed by representatives of the provincial and Dominion governments under date August 21, 1883, and was endorsed by Robert Dunsmuir, the leader of the group of contractors, with their acquiescence in its terms on August 22, 1883. The draft bill recited an agreement between the province and the Dominion for the purpose of settling existing disputes between them. It was passed by the provincial legislature and assented to on December 19, 1883. It was known as the "Settlement "Act." Sections 8 and 22 provided as follows:

"8. For the purpose of facilitating the construction "of the railway between Esquimalt and Nanaimo, it is "hereby enacted that such persons, hereinafter called

(1) [1948] S.C.R. 403.

" 'the company,' as may be named by the Governor-"General in Council, with all such other persons and "corporations as shall become shareholders in the "company, shall be and are hereby constituted a body "corporate and politic by the name of 'The Esquimalt " 'and Nanaimo Railway Company.' "

"22. The lands to be acquired by the company from "the Dominion government for the construction of the "railway shall not be subject to taxation, unless and "until the same are used by the company for other than "railroad purposes, or leased, occupied, sold, or "alienated."

(2.) A contract between the contractors and the Dominion government dated August 20, 1883, for the construction of the railway. By cl. 13 of that contract the government agreed to grant to the contractors by way of subsidy the cash and belt of land above-mentioned. By cl. 15 the land was to be granted subject in every respect to the provisions of the Settlement Act (then in the form of the draft bill). 1950 A.C. p. 91.

(3.) A Dominion Act (assented to on April 19, 1884) which recited the above-mentioned agreement between the province and the Dominion and also the passing of the Settlement Act by the provincial legislature.

(4.) Nomination (made by Dominion Order-in-Council on April 12, and gazetted on April 19, 1884) of the persons to be incorporated as provided by s. 8 of the Settlement Act whereby the railway company was brought into existence as a corporate entity.

(5.) Conveyance, dated April 21, 1887, of the island railway belt by the Dominion to the railway company on completion of the railway, subject, among other things, to the Dominion Act (No. 3 above) and the Settlement Act.

In addition to those constituent documents reference was made on behalf of the parties to a large number of documents, correspondence, Orders-in-Council, reports, etc. The Board had carefully considered them, but as in their opinion they lent no effective support to the case presented on behalf of the respondents they made no further reference to them.

The belt of land thus acquired by the railway company comprised valuable timber land and formed an important

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subsidy. Granted as it was, it was not subject to the payment of any royalty such as was ordinarily payable (subsequently, at any rate, to the year 1887) under Crown leases and licences relating to timber lands. Moreover, the tax exemption granted by s. 22 of the Settlement Act, so long as the conditions there mentioned continued to exist and so long as the section should remain in force, constituted a privilege of considerable value to the railway company. Among the taxes comprised in the exemption was the provincial land tax which was imposed on land in the province, including timber land.

On December 31, 1943, Sloan J., afterwards Chief Justice of the province, was appointed by the Lieutenant-Governor as Commissioner to inquire into a number of matters relating to the forest resources of the province. In 1945 the Commissioner issued his report which, among other things, dealt with the island railway belt. He pointed out that the province was receiving no revenue from the timber cut on those lands and discussed the possibility of imposing: (1.) a "severance tax" on such timber cut from such of the land as was sold by the railway company; (2.) a "fire "protection tax" on unalienated land. In relation to a "severance tax" he referred to certain considerations which had been placed before him on behalf of the railway company in the following terms: "(Page 179.) There never was any "contractual relationship between the provincial govern- "ment and the contractors or the railway company in "relation to the transfer of the railway belt to the railway "company. (Page 183.) It has been said that to impose "such a tax would be a 'breach of the contract between the " 'province and the railway company.' There are two "obvious answers to that argument. In the first place "there is no contract between the province and the company. "If, on the other hand, the Acts of 1883-84 are assumed to "create such a relationship, then the terms of s. 22 must "govern. That section, it will be recalled, only exempted "the railway lands from taxation 'until the same are used " 'for other than railroad purposes, or leased, occupied, " 'sold or alienated.' " The tax contemplated by the Commissioner was not to go outside that.

1950 A.C. p. 92.

Consequent on the raising of those matters by the Commissioner in his report a reference was made to the Court of Appeal of the province under the relevant provincial statute.

It submitted seven questions. All of them, except question 4, were answered by the majority of the Court of Appeal (O'Halloran, Sidney Smith and Bird JJ.A.) favourably to the submission made on behalf of the province. On appeal to the Supreme Court of Canada (Kerwin, Rand, Kellock, Estey and Locke JJ.) all were answered adversely to those submissions, and the Attorney-General for the province now appealed. The appeal was resisted by the railway company, Alpine Timber Co. Ld. (a past purchaser of land from the railway company) and the Attorney-General for Canada.

The seven questions fell under three heads. The first three raised, and involved in different forms, the question of an alleged contract between the province and the contractors or the railway company and the effect of such alleged contract in relation to different forms of proposed taxation having regard particularly to s. 22 of the Settlement Act. Questions 4, 5 and 6 were not concerned with the alleged contract, but raised the question whether the forms of taxation therein proposed were intra vires the provincial legislature. Question 7 raised a separate question which did not fall within either of those two heads.

1950 A.C. p. 93.

The questions referred were as follows:

(1.) "Was the said Commissioner right in his finding "that 'there never was any contractual relationship " 'between the provincial government and the con- " 'tractors or the railway company in relation to the " 'transfer of the railway belt to the railway company' ?"

(2.) "If there was a contract, would any of the legis- "lation herein outlined, if enacted, be a derogation from "the provisions of the contract?"

(3.) "Was the said Commissioner right in his finding "that 'There is no contract between the province and the " 'company,' which would be breached by the imposition "of the tax recommended by the Commissioner?"

(4.) "Would a tax imposed by the province on timber "as and when cut upon lands in the island railway belt, "the ownership of which is vested in a private individual "or corporation, the tax being a fixed sum per thousand "feet board measure in the timber cut, be ultra vires of "the province?"

(5.) "Is it within the competence of the legislature of "British Columbia to enact a statute for the imposition of

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"a tax on land of the island railway belt acquired in 1887 "by the Esquimalt and Nanaimo Railway Company from "Canada and containing provisions substantially as "follows:

"(*a*) When land in the belt is used by the railway "company for other than railroad purposes, or when it "is leased, occupied, sold or alienated, the owner "thereof shall thereupon be taxed upon such land as "and when merchantable timber is cut and severed "from the land:

"(*b*) The tax shall approximate the prevailing rates "of royalty per thousand feet of merchantable timber:

"(*c*) The owner shall be liable for payment of the "tax:

"(*d*) The tax until paid shall be a charge on the "land?"

(6.) "Is it within the competence of the legislature of "British Columbia to enact a statute for the imposition "of a tax on land of the island railway belt acquired in "1887 by the Esquimalt and Nanaimo Railway Company "from Canada and containing provisions substantially "as follows:

1950 A.C. p. 94.

"(*a*) The tax shall apply only to land in the belt when "used by the railway company for other than railroad "purposes, or when leased, occupied, sold, or alienated:

"(*b*) When land in the belt is used by the railway "company for other than railroad purposes, or when it is "leased, occupied, sold, or alienated, it shall thereupon "be assessed at its fair market value:

"(*c*) The owner of such land shall be taxed on the "land in a percentage of the assessed value, and the "tax shall be a charge on the land:

"(*d*) The time for payment of the tax shall be fixed "as follows:

"(i) Within a specified limited time after the "assessment, with a discount if paid within the "specified time;

"(ii) Or at the election of the taxpayer made "within a specified time after assessment, by paying "each year on account of the tax a sum that bears

"the same ratio to the total tax as the value of the "trees cut during that year bears to the assessed "value of the land."

(7.) "Is the Esquimalt and Nanaimo Railway liable to "the tax (so-called) for forest protection imposed by s. 123 "of the 'Forest Act,' being chapter 102 of the 'Revised "'Statutes of British Columbia, 1936,' in connexion with "its timber lands in the island railway belt acquired from "Canada in 1887? In particular does the said tax "(so-called) derogate from the provisions of s. 22 of the "aforesaid Act of 1883?"

1949. June 27, 28, 29, 30; July 4, 5, 6, 7, 11, 12 and 13. *J. W. deB. Farris K.C.*, *John L. Farris* and *H. Alan Maclean* (all of the Canadian Bar) for the appellant, the Attorney-General for British Columbia. On the first question—whether there was a contract between the province and the contractors or the railway company—there was neither an offer nor an acceptance here, which both depend on intent. The province was dealing in a contractual manner with the Dominion, and at the instigation of the latter, on a high level of the two governments, each having plenary powers within its jurisdiction, and therefore there was no intent to deal with the company except in regard to certain details which are set out in the Act. The contractors, or the company as their successors, made their contract exclusively with the Dominion. In a petition in 1904 by the railway company to the Governor-General in Council for the disallowance of an Act known as the "Vancouver Island Settlers' Rights Act, 1904," it was stated that "the Esquimalt and Nanaimo Railway Company "do not recognize the right of the provincial legislature "to interfere with the land grant, as the company did not "receive the land from the provincial government, nor "did they enter into any contract with the provincial "government." No more authoritative statement could be made than that. [Reference was made to *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (1).] Section 3 of the Settlement Act, 1883, grants the land to the Dominion "in trust to be appropriated as they may deem "advisable." The Dominion, however, are not trustees for the contractors. If such a trust were to be set up there

1950 A.C. p. 95.

(1) [1930] A.C. 357.

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would have to be a real tripartite agreement between the parties. The contract of the Dominion with the contractors negatives a trust. The Settlement Act was not open to the construction that the Dominion was a trustee for a corporation which had net yet been created: *Burrard Power Co., Ltd.* v. *The King* (1); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2). The agreement of August 20, 1883, between the contractors and the Dominion negatives the suggestion that the Dominion was holding these lands in trust for the contractors or their successors. It is a straight contracting in consideration of certain things to be done. Again, in the Dominion Act of 1884, which recited the above agreement, there is no suggestion that these lands were being held as trust lands by the company. The recitals of the Settlement Act are also against any inference of trust.

If there is no contract between the province and the contractors, the second question does not arise. If it is held that there was a contract, question two becomes material, and should, it is submitted, have been answered in the negative, first, because the tax proposed is not inconsistent with the terms of s. 22 of the Settlement Act, and secondly, because the railway company has for some years used the lands for other than railroad purposes. As stated by O'Halloran J.A., "the railway company assumed title to these lands on the "terms set out in s. 22 and cannot now complain of the "basis on which its title rests." Further, s. 22 of the Settlement Act and s. 7 of the Interpretation Act, 1877, must be read together in the sense that one necessarily qualifies the other, and any interference with s. 22, if done in the public interest, must be presumed to be good. Question (3) at first sight appears to overlap question (1), but it has relation to a different subject-matter: it was intended only to be directed to the Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act, 1912, of British Columbia. The provisions of that Act, however, did not in intent or result indicate or create any contractual obligations between the company and the province changing the operative effect of s. 22 or adding thereto any new obligations, and question (3) should be answered in the affirmative. The tax that should stand or fall is in question (6)—the appellant is not so much concerned

1950 A.C. p. 96.

(1) [1911] A.C. 87, 94. (2) (1889) 14 App. Cas. 295, 299.

with questions (4) and (5), and it is proposed to argue question (6) detached from any association with them. Question (6) should have been answered in the affirmative because the tax proposed is a land tax and as such is a direct tax within the competence of the province. Sub-head (*c*) of question (6) is a clear announcement that the owner of the land shall be taxed. If this is a land tax that is an end of the matter. The tax is valid within the decisions of this Board in *City of Montreal* v. *Attorney-General for Canada* (1) and *City of Halifax* v. *Fairbanks' Estate* (2). *Forbes* v. *Attorney-General for Manitoba* (3) is a direct confirmation of the principle laid down in the *Fairbanks'* case (2) that, if the tax falls within one of the well-known categories which in themselves determine whether a tax is direct or indirect, that is an end of the matter. In *Atlantic Smoke Shops, Ld.* v. *Conlon* (4) it was said that "it has been long and "firmly established that, in interpreting the phrase 'direct " 'taxation' in head 2 of s. 92 of the Act of 1867, the guide "to be followed is that provided by the distinction between "direct and indirect taxes which is to be found in the "treatise of John Stuart Mill," where it was said that a direct tax is one which is demanded from the very persons who it is intended or desired should pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The *Fairbanks'* case (2), confirmed by the *Forbes* case (3), together with the *Montreal* case (1) is authority for the proposition that if a tax is a tax on the land that is the end of it, and it falls within the well-known classification. The Supreme Court said that this was an indirect tax, and secondly, that it is a colourable tax. The wording of the Act itself is contrary to that. The inference drawn by the Supreme Court as to the purpose of the tax is incorrect. The nature of the tax as a land tax is not changed because the value of the land is largely determined by the value of the standing timber. The principles established by the Supreme Court in *Reference as to the Validity of s.* 31 *of the Municial District Act Amendment Act,* 1941, *Alberta Statute,* c. 53, *and as to the Operation thereof* (5) and in *Home Oil Distributors, Ld.* v. *Attorney-General for British*

1950 A.C. p. 97.

(1) [1923] A.C. 136, 142.
(2) [1928] A.C. 117, 122.
(3) [1937] A.C. 260, 268.
(4) [1943] A.C. 550, 563.
(5) [1943] S.C.R. 295, 298.

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Columbia (1) support the submission for the appellant here. The last-cited case, though not directly in point, assists on "colour-ability." There is no justification for the suggestion that the proposed tax is colourable. The only intent to be inferred from the proposed legislation is the desire of the government of the province to impose a direct tax on the lands in question for the raising of revenue for provincial purposes.

John L. Farris followed. With regard to question (7), it is submitted, first, that the contributions exacted under s. 124 of the Forest Act are not taxes, but are simply service charges for special services, and secondly, that, even assuming that they are taxes, they are not taxation within the meaning of s. 22 of the Settlement Act. The Forest Act is not a taxing statute. The present case is a little stronger than the English War Damage Act, 1941, because under that Act the sums go to the Exchequer, into the consolidated revenue fund, whereas under the Forest Act they go into a special forest protection fund which is maintained at a certain level. It is not a tax at all, but is a service charge for the protection which the province gives to the owners of timber. In *Shannon* v. *Lower Mainland Dairy Products Board* (2) the Board held that the fees there in question were supported as charges for services rendered. [Reference was also made to *In re Constitutional Questions Determination Act and In re Natural Products Marketing (British Columbia) Act* (3).] A service charge differs from a tax in that it is assessed only on those who are receiving the services, and moneys so obtained are used primarily for the special benefit of those who have been charged, whereas a tax is paid to the State primarily for public purposes. The cases relied on in the court below by the respondents are, it is submitted, distinguishable: *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (4); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (5) —there is a great distinction between the adjustment levy in that case and the contribution in the present case; there was no suggestion in that case of any service being rendered in return for it; *Morris Leventhal* v. *David Jones Ltd.* (6) illustrates the difference between a tax for a specific public

1950 A.C. p. 98.

(1) [1940] S.C.R. 444, 448, 451-2.
(2) [1938] A.C. 708, 720-1.
(3) [1937] 52 B.C.R. 179, 192.
(4) [1931] S.C.R. 357, 362-4.
(5) [1933] A.C. 168, 174-5.
(6) [1930] A.C. 259, 269.

purpose and a charge for a special service. *City of Halifax* v. *Nova Scotia Car Works Ld.* (1) was again a case where the tax was for the general benefit of the public as a whole, and therein lies the distinction. This contribution is not a burden in the sense in which ordinary taxation is a burden, because full value is given and to the contributors alone. The object of the Act must be taken into consideration, and here the object is to relieve the railway company from a burden: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2).

C. F. H. Carson K.C. (Canadian Bar), *Gahan*, and *Allan Findlay* (Canadian Bar) for the respondent the Esquimalt and Nanaimo Railway Co. It is not contended that there was a formal contract between the railway company and the provincial legislature, or that the subject-matter of any contract was existing legislation, that is, s. 22 or other sections of the Settlement Act. What is contended is, broadly, that there was a business arrangement between the provincial government, that is, the executive, or the province in right of the King, the Dominion government, that is, the executive, or the Dominion in right of the King, and the builders of the railway pursuant to which the railway company was to built and maintain and work in perpetuity both the railway and the telegraph line, in consideration of which the railway company was to receive from the Dominion $750,000 and was to receive from the province a grant of tax-free lands. In those circumstances there was a contractual relationship between the provincial government and the contractors, one term of which was that the province was to make a grant of tax-free lands. That required provincial legislation and in fulfilment of its obligation to that end the provincial government introduced and passed the Settlement Act which contained s. 22 granting immunity from taxation to the agreed extent. The suggestion put against the respondents is that no legislature can bind future legislatures. If there is such a contractual relationship, however, the government whom the appellant represents on this appeal does not propose to do anything in violation of it. The Supreme Court held that there was no contractual relationship with the contractors, but that there was with the railway company; in any event the position of the contractors was temporary only, and ceases

[1950] A.C. p. 99.

(1) [1914] A.C. 992, 997.

(2) [1924] A.C. 222, 242.

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to be of any practical importance except so far as it has any bearing on the position of the railway company, for the only point is whether there is any contractual relationship continuing to the present time with the railway company. Abundant evidence establishing such contractual relationship is to be found in the legislation, the documents, the acts of the parties and the circumstances under which the railway was constructed. Each of the three agreeing parties to the construction of the railway had assumed definite obligations. First, the Dominion was to contribute $750,000, hold the provincial lands in trust, and take security for the construction of the railway. Secondly, the contractors were to put up $250,000 as security, and when incorporated as the railway company were to build the railway and the telegraph line and to maintain and work them continuously. Thirdly, the province was to furnish a minimum of 1,900,000 acres of land, was to incorporate the railway company, and further, the lands granted for the railway were to be free from taxation—in the terms of s. 22 of the Act of 1883. When the Act is examined it is found that the railway company shall do certain things, and the implication is that there has been a pre-existing agreement; it is evidence of such an agreement, so that there is a contractual relationship, and it follows that the tax exemption is part of that relationship. The contractual relationship between the province and the railway was part of the tripartite agreement, and there was consideration involving mutual promises. All the obligations of the province are plainly expressed in written words, and so are those of the railway company; the only thing that is not expressed in writing is that we, the province, and we, the railway company, contract an agreement as follows. It should be implied, however, from the evidence that when the province and the railway company each entered, for the benefit of the other, into precisely defined obligations, they did so in agreement with each other and in consideration of what the other was doing so as to meet their agreement and contractual obligations—and that applies to the tax exemption provision.

1950 A.C. p. 100.

The Dominion assumed the role of agent of the province to construct the railway. It was not content as between itself and the province to assume the role of principal either in constructing or securing the construction of the railway for

the province. The provincial government are in every way the real principals. It is consistent with the view that the Dominion was agent for this purpose that the land grant should be made to the Dominion in the first instance to be held in trust and to be turned over to the railway company on completion of the work. With regard to the trust, one must read the whole Act, and it is clear that the Dominion was to receive the legal title to the lands, but was expressly excluded from the beneficial ownership, because that was to vest in the cestui que trust. The fact that the province created the Dominion trustee of the lands is some evidence of this contractual basis. [Reference was made to *Canadian Pacific Ry. Co.* v. *The King* (1).] Clause 15 of the construction contract of August 20, 1883, relating to the grant of land, was inserted with the knowledge and authority of the province, and was a promise made by the province through its agent, the Dominion, and if that is so, it follows that the province contracted with the contractors in relation to the transfer of the railway belt to the railway company, and the province was the real principal. Lastly, *Dominion Building Corporation* v. *The King* (2) is an illustration of the Crown being held liable in respect of a contract that required legislative action over a period of years. [Reference was also made to *Attorney-General for Canada* v. *Attorney-General for Ontario* (3).]

Assuming that question (1) is answered in favour of the respondents, it is submitted on question (2) that the effect of the proposed legislation would be (*a*) substantially to reduce the value of this respondent's timber lands; (*b*) to take away a material part of the consideration for which this respondent entered into the contract with the province; and (*c*) to tax the timber lands of the company in contravention of the tax exemption. This tax would be over and above the tax to which all Crown timber lands are subject under the taxation of British Columbia. While the proposed tax would normally be imposed on, and paid by, the purchaser from the railway company, the tax would in fact be borne by the railway company in the sale of its timber lands, with the result that the province would have deprived the company of a large part of the consideration received for constructing the railway. In effect it would

1950 A.C. p. 101.

(1) [1931] A.C. 414, 428. (2) [1933] A.C. 533, 540, 544.
(3) [1937] A.C. 326, 347.

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not be materially different from confiscation without compensation. The enactment of the tax, although not due for payment until the lands are sold, operates immediately to reduce their value in the hands of the railway company. There could be no complaint of the tax, operating as it does only after sale, if it were imposed on all timber lands in the province. The complaint is that because no other lands were so taxed our timber lands were deprived of more than half their value. That constitutes a derogation from our contract. On the true construction of s. 22 taxation does not mean a discriminatory tax on the railway lands, and this discriminatory taxation would be a derogation from the contract and from the grant. [Reference was made to *Burrard Power Co., Ld.* v. *The King* (1).]

As to question (3), there are two contracts which would be breached by the imposition of the tax, first, the one under question (1), and even if that be wrong, then the 1912 contract entered into between the province and this respondent when its railway was leased to the Canadian Pacific Railway Company would be breached. If I am right either on question (1) or on the 1912 contract, then question (3) must be answered in my favour.

It was stated for the appellant that if he got a favourable answer on question (6) he was not concerned with questions (4) and (5). While the latter is on its face a tax on land, it is really a timber tax. Turning to question (6), an attempt has been made to relate the tax to the assessed value of the land and thereby to give it the appearance of a land tax. [Reference was made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (3).] The proposed legislation, while purporting to impose a tax on the land, would in effect impose a tax on the timber. From an examination of the effect of the legislation outlined in question (6) it would appear that the tax is substantially the same as the taxes proposed by questions (4) and (5)—the contents in the bottle are the same, the label has been changed. The tax bears no relation to the land value. If it is right that the tax in question (6) when demanded from the purchaser is a timber tax, it would equally be so when

1950 A.C. p. 102.

(1) [1911] A.C. 87, 94. (2) [1924] A.C. 328, 337.
(3) [1939] A.C. 117, 130.

demanded from the railway company. No sane business man would elect to pay under option (*d*) (i) with all the risks of fire, pests, etc., and question (6) should be considered as though that option is not there. Next, the tax would not be demanded from the person who it is intended or desired should pay it, but would be demanded from one person in the expectation and intention that he should indemnify himself at the expense of another. Such taxation would not be direct taxation within the meaning of s. 92 (2) of the British North America Act: *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (2); *Caledonian Collieries* v. *The King* (3); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (4); *City of Charlottetown* v. *Foundation Maritime, Ld.* (5); *Forbes* v. *Attorney-General for Manitoba* (6) and *Reference re the Validity of* s. 31 *of the Municipal District Act Amendment Act*, 1941 (7). It was said for the appellant that if this is a land tax that is an end of the matter; that "if" is a big one in this case. This particular tax has not followed the general tendency: Mill's formula was not relevant to a tax which was passed back. Locke J. in the Supreme Court sums up the way we put it: "It appears to me to be perfectly "clear that this tax would not be borne by the person who "would pay it, since he would by the reduction in the "purchase price have indemnified himself either wholly or "in part at the expense of the railway company if he bought "from them directly."

As to question (7), the levy provided by s. 124 of the Forest Act is a tax, and this respondent, by virtue of s. 22 of the Settlement Act, is not liable to taxation in respect of the lands referred to in the question.

D. N. Hossie K.C. (Canadian Bar) and *J. G. le Quesne* for the respondent the Alpine Timber Co. Ld. Our interest in this appeal is that we are purchasers from the railway company from time to time of considerable quantities of these very timber lands, and are the persons on, and from whom, in the first instance the province proposes to levy and collect this tax. We rely on and adopt the argument of

1950 A.C. p. 103.

(1) [1925] A.C. 561, 566, 568.
(2) [1927] A.C. 934, 936.
(3) [1927] S.C.R. 257; [1928] A.C. 358, 362.
(4) [1930] A.C. 357, 363.
(5) [1932] S.C.R. 589.
(6) [1937] A.C. 260, 268.
(7) [1943] S.C.R. 295.

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counsel for the railway company. On question (1), whether there was a contract between the province and the contractors or the railway company, an alternative submission is that a contract between the province and the railway company is to be found in two documents, first, that part of the Settlement Act which deals with the railway company, ss. 8 to 28 inclusive, and secondly, the Order in Council of 1884 passed by the Dominion naming the incorporators of the company. Those two documents taken together regulate the contractual relationship between the railway company and the province qua the railway lands, and make up evidence of the contract. [Reference was made to *Davies* v. *Rhondda District Urban Council* (1), and *Sutton* v. *Attorney-General* (2).] The conduct of the parties since April 19, 1884 (the date of the Dominion Act) was entirely consistent with the existence of a contract between the province and the railway company, and in fact was inconsistent with the opposite suggestion. In other words, the province has done exactly what it would be expected to do if s. 22 were a term of the contract between the railway company and the province. The company has been allowed for this period of 60 years to build more railways, spend more money and open up more lands, all consistent with the contract, and the province has not exacted any other terms from them, but has accepted that position. [Reference was made to *Commercial Cable Co.* v. *Government of Newfoundland* (3).] As to question (2), the proposed legislation would reduce the value of the lands to the railway company. We being in the position of prospective purchasers of timber lands, the position is just the same as if we were offered lands by the railway company which were subject to an encumbrance. All I have said on question (1) applies equally to question (3). The taxes which are suggested in questions (5) and (6) are really nothing more than question (4) in a different form. They are all timber taxes. Cases which have not been cited are *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (4), *Attorney-General for Quebec* v. *Queen Insurance Co.* (5) and *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ld.* (6).

1950 A.C. p. 104.

(1) (1918) 87 L.J. (K.B.) 166, 169.
(2) (1923) 39 T.L.R. 294, 296-9.
(3) [1916] 2 A.C. 610, 614.
(4) [1940] A.C. 513, 529, 533.
(5) (1878) 3 App. Cas. 1090, 1099.
(6) [1941] S.C.R. 573.

The discriminatory nature of the tax is in itself an element to be considered in determining what the tax really is and what the legislature is really doing. The fact that the tax is imposed only on railway lands indicates that it is intended to hit the railway company and not the purchaser of the land: *Forbes* v. *Attorney-General for Manitoba* (1); *City of Halifax* v. *Fairbanks' Estate* (2); *City of Montreal* v. *Attorney-General for Canada* (3) and *Reference as to the Validity of s.* 31 *of the Municipal District Amendment Act*, 1941 (4). Here there is a special rate, which is not levied for ordinary purposes, and which exceeds the ordinary local rates and goes to 55 per cent. The tax is clearly a "new and unfamiliar "tax" in its very nature: the *Fairbanks'* case (2). It was said in *Atlantic Smoke Shops* v. *Conlon* (5) that "it would be "more accurate to say that a sales tax is indirect when in "the normal course it can be passed on," and that the *Fairbanks'* case (2) should "not be understood as relieving "the courts from the obligation of examining the real "nature and effect of the particular tax .... or as justifying "the classification of the tax as indirect merely because it "is in some sense associated with the purchase of an article." The tax proposed in question (6) is nothing more than a royalty measured by the timber which is on the land. Any discount which would be offered could not in the nature of things be commensurate with the risk which the operator has to take: it is impossible to compute the results of fire, insects, disease, blow-down, etc.

B. MacKenna, and *W. R. Jackett* (Canadian Bar) for the respondent the Attorney-General for Canada. The Dominion is interested in the outcome of this appeal for two reasons. First, it is concerned that an unduly wide interpretation should not be given to the provincial power to make laws in respect of direct taxation, and for that reason wishes to uphold the answers given in the Supreme Court to questions (4), (5) and (6). Secondly, it is also concerned that any action should be taken by the province which would defeat what in the Dominion's view was the intention of the parties in 1883, and for that reason the Dominion supports the answers given in the Supreme Court to questions (1), (2) and (3). The first matter of importance is

(1) [1937] A.C. 260, 269.
(2) [1928] A.C. 117, 123.
(3) [1923] A.C. 136, 143.
(4) [1943] S.C.R. 295, 299.
(5) [1943] A.C. 550, 564, 565.

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that relating to direct taxation. In considering the 6th question it will be assumed that the answers given to questions (4) and (5) in the Supreme Court were right. There is no difference in substance between the tax projected in question (6) and that in question (5). In considering whether the tax in question (6) is an indirect or a direct tax the test to be applied is whether there is a tendency, according to the common understanding of man, that a tax of that description would be passed by the railway company to the person to whom it sells the timber. There would be such a tendency in this case. I invite the Board to approach the question in the way O'Halloran J.A. did when dealing with question (4): "Put shortly, is "such a tax direct or indirect? The tax is on the timber "as and when cut; . . . . It is not a tax on land. It does not "arise until the timber is severed from the land and becomes "personalty." I am not overlooking the fact that in question (6) it is described as a tax on land. Whether imposed under question (6), (5) or (4), the tendency would be to pass it on, and if that be the right test each question demands the same answer—it is indirect and ultra vires. There are three authorities in answer to the suggestion that in certain circumstances the railway company might not be able to pass on the tax in whole or in part: *City of Charlottetown* v. *Foundation Maritime Ld.* (1); *Rex* v. *Caledonian Collieries* (2) and *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (3). In *De Waal, N.O.* v. *North Bay Canning Co. Ld.* (4) it was argued that the relevant tax was not indirect because it could not be passed on because of competition; that was rejected, and it was held to be an indirect tax. When it is a question of tendency the form of the tax cannot be decisive and, indeed, can hardly be relevant, whether it is expressed to be on land or timber. As to the "substance" of the tax, there is no difference; "substance" in relation to the question of directness or indirectness means tendency. Where there is a tax imposed on land of which the greater part of the value is timber, then the tendency would be to pass on that part of the tax which is related to the value of the timber. The tax here is indirect. On the question whether the tax would be indirect if it were

(1) [1932] S.C.R. 589, 596.
(2) [1928] A.C. 358.
(3) [1930] A.C. 357.
(4) (1921) S.A.L.R. (A.D.) 521, 527.

passed back to the railway company in the event of a sale to some lumber company by lowering of the purchase price, *Bank of Toronto* v. *Lambe* (1) is as near as one can get on the question of passing backwards, though it is not very much in point. It is submitted that it would be as much indirect as in passing forward.

On the question of contractual relationship referred to in questions (1), (2) and (3), there is an agreement intended to be binding which would be derogated from it these contemplated taxes were passed. There is certainly an agreement between the Dominion and the province, and no question of any want of power. It was an implied term of the agreement between the Dominion and the province that the province should not derogate from its grant. The Dominion took the island belt and the benefit of the implied terms on trust for the railway company. [Reference was made to *Gregory* v. *Williams* (2), *In re Empress Engineering Co.* (3) *and Mulholland* v. *Merriam* (4).] The answers in the Supreme Court of Kellock and Estey JJ. to the first three questions were correct.

J. W. deB. Farris K.C. replied. The first option in question (6) (*d*) (i) is a bona fide alternative to option (ii). The suggestion has been made that the discount would not be commensurate to the risk involved, and that therefore option (ii) would always be accepted. In the coastal area the annual loss by fire is only 5·5 per cent., but only ·6 of the total amount of timber cut each year is lost by fire. The total loss from insects is small, and there is no windfall loss. There is no difficulty in assessing the risk in determining what is considered a fair purchase price, and there should be no difficulty in arriving at such a discount. The tax itself is a direct tax on the land, and that is not affected by an option for postponement of the time of payment. The second option is valid because it is an alternative to option (i), and it is admitted that even standing alone option (ii) is an actual tax on the land: it is assessed on the land as land; the land is not free from the tax until the tax is paid; the severed timber is not taxable, and there is no lien on it. The submission that this tax is indirect and not a land tax is incorrect. There is

(1) (1887) 12 App. Cas. 575,582-3.
(2) (1817) 3 Mer. 582.
(3) (1880) 16 Ch. D. 125.
(4) (1872) 19 Grant, Ch. (U.C.) 288.

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no authority to support the proposition that what has happened here is a passing back in the sense of an indirect tax.

Nov. 2. The judgment of their Lordships was delivered by LORD GREENE, who stated the facts and the questions referred as set out above and continued: It will be seen that if the answer to question (1) is in the affirmative questions (2) and (3) do not arise.

The nature and object of the contention that a contractual relationship came into existence between the province (i.e. the Crown in right of the province) and the contractors and the railway company (either as successors to the contractors or independently in their own right) whereby the railway company became contractually entitled to have and keep the benefit of the tax exemption contained in s. 22 is clearly explained in the following extract from the judgment of O'Halloran J.A. in the Court of Appeal: " . . . . we are not concerned with s. 22 in its purely statutory "status. It stands as a statutory provision in the same "way as any other statutory provision, viz., until it is "amended or repealed. But the contract argument aims "to give it more lasting virtue, viz., that it reflects a contract "between the province and the contractors that it would "not be amended or repealed except as a breach of contract "with consequential remedies to the contractors." In the Court of Appeal O'Halloran J.A. came to the conclusion that there was no contractual relationship between the province and the contractors or the railway company. Their Lordships agree with this conclusion and with the reasoning on which it is based. Bird J.A. was of the same opinion as O'Halloran J.A. Sidney Smith J.A. dissented. In the Supreme Court all members agreed that there was no contract between the province and the contractors, but they all took the view that a contract (or its practical equivalent) between the province and the railway company had been established.

Having regard to the concurrent decisions in the Canadian courts that there was no contractual relationship between the province and the contractors their Lordships do not propose to do more than make some general observations on that topic. Some of them are not without relevance, in their Lordships' view, to the matter of the alleged con-

tract between the province and the railway company. Their Lordships think it right to state clearly that they must not be understood as expressing an opinion as to any moral right to complain of the proposed taxation which the railway company may conceive itself to have. No such matter is raised or, indeed, could be raised by any of the questions referred, which are concerned solely with the legal position. Not only must moral and political considerations be rigidly excluded, but the dividing line between rights and liabilities created by legislation and those created by contract must not be blurred.

Besides involving an offer and an acceptance (either of which may in appropriate cases be expressed in words or by conduct) and the presence of consideration a contract can only come into existence if an intention to contract is present. That negotiations took place, that there were three parties who took part in them, namely, the Dominion government, the provincial government and the contractors, that the negotiations resulted in a definite arrangement under which each party was to play, and did play, its appointed part—all these matters are beyond dispute. Agreements were entered into in contractual form between the province and the Dominion and between the Dominion and the contractors. But there was no such agreement between the province and the contractors, and the whole case under this head rests on the contention that such an agreement ought to be inferred from the documents and the acts of the parties. That the enactment of the Settlement Act and, in particular, of s. 22 thereof was an essential part of the arrangement is again obvious. The whole arrangement would have broken down if the provincial legislature had refused to enact that section. But much more than this would be needed before the existence of a contractual obligation to procure its enactment could be inferred. Even more difficult to infer, in their Lordships' opinion, would be any intention of a contractual nature that the section, when enacted, should remain for all time on the Statute Book. If a promise that it should be put on the Statute Book be assumed, it was a promise by the Crown that there should be enacted something which in its very nature as legislation was susceptible of repeal or amendment by the legislature. The difficulties in the way of extending such a promise so as to include an undertaking

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by the executive which would be broken if it were thought desirable in the public interest to introduce amending legislation on some subsequent occasion appear to their Lordships to be, for constitutional reasons alone, insurmountable.

But, it is asked, would business men have been content with an arrangement which on a vital matter gave them security of so precarious a nature? It appears to their Lordships that one answer to this criticism would be that if business men had desired to have a binding contractual promise of the kind suggested—a promise, indeed, of a character which (to say the least) no government would be likely to give with alacrity—they would have obtained a written contract to that effect and not left it to be merely inferred. Moreover, the lack of security must not, in their Lordships' view, be exaggerated. To have on the Statute Book a section in the terms of s. 22 was in itself an important practical safeguard. What the contractors wanted, and what from the business point of view they were entitled to ask for, was the enactment of the Settlement Act containing s. 22. This they obtained. But they obtained it not by virtue of any contractual right binding on the province but as a mere business matter of fact. Their Lordships find no reason for inferring in addition any contractual right to call for what they in fact obtained, still less a contractual right of such a nature as would give them in law a right to complain of breach of contract if legislation diminishing or taking away the tax exemption conferred by s. 22 were to be passed at a later date. This view is confirmed by the fact that in the case of the Dominion a written contract (the construction contract of August 20, 1883) was entered into with the contractors. This alone makes it impossible in their Lordships' opinion to imply a contract between the contractors and the province, a contract not contained in any writing and of which there is no affirmative evidence. This written contract with the Dominion is one on which alone the contractors might be expected to have relied without requiring it to be supplemented by a further contract with the province. As in their Lordships' opinion no such contractual relationship as is suggested ever came into existence as between the province and the contractors it follows that no such relationship could be claimed by the railway company to exist for

its benefit by reason of its succession to the rights of the contractors.

The Supreme Court, however, thought that a contract (or what in practice was its equivalent) between the province and the railway company in its own right and not as successor to the contractors ought to be inferred. Kerwin and Locke JJ., with whom Rand J. was in substantial agreement, thought that the province, by holding out the promised tax exemption as an inducement to the railway company, must be taken to have agreed that it should enjoy the exemption as a matter of contractual right once the railway was constructed. On this view s. 22 is to be regarded as an offer. In the words of Rand J., "a statutory benefit "arising through the performance of conditions laid down "in the statute as the quid pro quo of the benefit, is a "contractual right: and . . . . upon performance by the "company here, the engagement became binding upon "the Crown" (1). Their Lordships are unable to accept the conclusions of these learned judges. They cannot agree that a section of an Act of Parliament is to be regarded as an offer by the executive; and there can be no question of an offer by the legislature, which no one suggests could become a party to the supposed contract. Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct. Parliament could no doubt enact that a section of a statute should have the force of an offer by the Crown capable of being accepted by a subject. But here it has not done so, and it is impossible to place such a construction on the simple language of s. 22. The railway company no doubt did rely on s. 22: but the only inference which, in their Lordships' opinion, can be drawn is that it relied on the section as an existing and valuable piece of legislation and not as an offer capable of being accepted so as to bring into existence a contract binding on the Crown.

Kellock J., although inclined to take the same view as the majority, did not express a concluded opinion on it since he found for the existence of a contractual relationship by another route. "In my opinion" he said, "the lands "together with the immunity from taxation were the "subject of a contractual obligation between the province

(1) [1948] S.C.R. 440.

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"and the Dominion as to which the latter was a trustee for "the company upon fulfilment of the terms by the company "which would entitle it to a conveyance" (1). Apart from the improbability that the Dominion would have taken upon itself the duties of a trustee towards a subject, their Lordships are unable to find grounds in the facts of the case for holding that any such relationship was ever contemplated. Reliance was placed on s. 3 of the Settlement Act, which grants the land "to the Dominion Government, "for the purpose of constructing, and to aid in the construc- "tion of a railway between Esquimalt and Nanaimo, and "in trust to be appropriated as they may deem advisable." Their Lordships are unable to construe this reference to a trust as intended to constitute the Dominion a trustee for the railway company. The "trust," if indeed the word is used here in any strict sense, means in their opinion no more than that the Dominion is to be under a trust obligation towards the province by which it would be bound to appropriate the land for the purposes indicated. Section 11 of the Terms of Union of 1871, under which British Columbia was admitted to the Dominion, uses the same word "trust" in relation to the land which was to be conveyed to the Dominion thereunder "in trust to be appro- "priated . . . . in furtherance of the construction" of a railway to connect the sea-board of British Columbia with the railway system of Canada.

1950 A.C. p. 111.

Estey J. also found for a trust enforceable by the railway company. He said: "If the province had been contracting "with the Dunsmuir group for the construction of the "railway a trust would not have been necessary. In order "that both governments might make their respective "contributions and but one government make the contract "for the construction of the island railway, the governments "with respect to these lands created a trust. The covenant "of the province with the Dominion to exempt these lands "when conveyed upon the completion of the railway was "a term of that trust. The contractual obligations of the "province with respect to the exemption provided in s. 22 "are no different from its position had it contracted direct "with the railway, except as to questions of enforcement "not here in issue" (2). Their Lordships are unable to find any sufficient ground for introducing so complicated

(1) Ibid. 452 (A.C.). (2) [1948] S.C.R. 461.

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a conception into what appears to them, once the respective attitudes taken up by the province and the Dominion are appreciated, a simply and intelligible scheme.

An attempt was made in argument to establish a contractual relationship between the province and the contractors by suggesting that in entering into the construction agreement the Dominion was acting as agent for the province. Their Lordships do not find a trace of evidence which could support such a proposition. Their Lordships do not leave the question of contractual relationship without referring to an alternative argument that such a relationship was affirmed or brought into existence in 1912. In that year an Act was passed by the provincial legislature for the purpose of ratifying an agreement (scheduled to the Act) which had been entered into by the Crown in right of the province and the railway company. The scheduled agreement refers to s. 22 of the Settlement Act and recites that the company wished to lease its railway to the Canadian Pacific Railway Company but wished to be assured that such leasing and the operation of the railway by the Canadian Pacific Railway should not affect the exemption from taxation given by the section. It then provided (cl. 1) that the leasing and operation "shall not affect the "exemption . . . . and notwithstanding such lease and opera- "tion such exemption shall remain in full force and virtue." By cl. 2 the company agreed to pay to the province an annual sum of $1\frac{1}{2}$ cents per acre of land not used for railway purposes which on the date of payment should be exempt from taxation. By cl. 3 the company agreed to construct and operate an extension of its main line therein described. Their Lordships cannot ascribe to this agreement or to the Act which ratified it any operation beyond that expressed by the language used. The situation was a simple one. The proposed leasing to the Canadian Pacific Railway would, by the express terms of s. 22 of the Settlement Act, have put an end to the exemption granted by that section. The railway company was successful in getting the province to agree that the exemption should be continued notwithstanding the leasing. On its side the railway company agreed to give consideration for this concession, which took the form of an annual payment in respect of lands enjoying the exemption and an undertaking to construct and operate the extension. An Act of Parliament was necessary

1950 A.C. p. 112.

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before the tax exemption could be preserved notwithstanding the leasing. In their Lordships' opinion this was the only effect of the events relied on. They merely had the effect of preserving the existing exemption and did not otherwise extend its operation or alter its character.

Their Lordships now turn to questions (4), (5) and (6). The various forms of tax described in them are not identical with, or confined to, the form of tax recommended by the Commissioner and loosely called by him a "severance tax." Their validity must be determined by reference to the language of the questions themselves and not to expressions used by the Commissioner in his report. The questions are as follows: [His Lordship stated questions (4), (5) and (6) and continued:] Their Lordships do not propose to consider questions (4) and (5). The Supreme Court held that the imposition of the taxes there described would be ultra vires of the provincial legislature and counsel for the appellant did not seek to disturb this finding provided he were to be successful with regard to question (6). As the Board considers that he is so entitled to succeed, the answers of the Supreme Court to questions (4) and (5) will stand.

1950 A.C. p. 113.

The Court of Appeal by a majority (Sidney Smith J.A. dissenting) answered question (6) in the affirmative, holding that the tax there described was a direct tax. In the Supreme Court this decision was reversed. The appellant claims that this tax is what it is described in the question to be, namely, a land tax, and that it falls within the category of direct taxation. On behalf of the respondents it is contended that in pith and substance the tax is not a land tax at all, but a timber tax, and therefore indirect, and that in any case, whatever label be attached to the tax, it is in its nature indirect as tending to be passed to persons other than the assessee. Their Lordships have been assisted by very careful and full arguments and a number of authorities have been referred to in which particular taxes were examined to see whether they fell within the category of direct or that of indirect taxation. The principles on which such a question falls to be decided are not, however, in doubt, and their Lordships do not find it necessary to refer to more than a few of the authorities cited. The answer to

the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

The tax is described as a "tax on land of the island railway "belt." The provisions proposed are described as being "substantially as follows." Certain of these provisions are susceptible of more than one meaning and there has been acute controversy as to how they should be interpreted. The first example of this is to be found in para. (*a*) in its application to land "when used" by the railway company for other than railroad purposes. This, it was suggested, must mean that if the railway company determined to cut the timber and sell it the subject-matter of assessments could only be the sites of the individual trees cut and this, it was argued, shewed that the tax was in reality a tax on the timber. But their Lordships are of opinion that this involves too narrow a construction of the word "used." The expression "used by the railway company" is obviously taken from s. 22 of the Settlement Act. It must, in their Lordships' opinion, be interpreted in a reasonable way and would apply to any area which the railway company might take practical steps to lay out and dedicate to some user other than a railway user and not merely to individual spots in the area (such as the site of a tree) on which actual operations had been put into execution.

Another example is to be found in the first option in para. (*d*), the option to pay the amount of the assessment under "discount." This, it is said, must be interpreted as referring only to a commercial discount based on the present value of money payable in the future. This option therefore, it is said, is a mere sham since no one would choose it, the reason being that such a "discount" would take no account of the risks (e.g., that of fire) which, if they eventuated, would result in no tax being paid at all by a person who had chosen the second option. Counsel for the appellant repudiated on behalf of his clients any intention that the first option should be other than a real option, and he maintained that the "discount" referred to would take into account the risks in question so to give to the owner a real and not a sham option.

1950 A.C. p. 114.

While their Lordships might find it difficult to rest on a mere assurance of this kind they think it legitimate and

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proper to interpret an ambiguous word such as "discount" in a sense which will give reality to the option. In construing questions of this nature, which do not purport to give more than an outline of the proposed legislation, the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled, and it may often be necessary in construing what is no more than a "projet de loi" to assume a reasonable intention in that regard on the part of the legislature. Still more, their Lordships think, an intention must not, in the absence of clear words, be ascribed to a responsible legislature of enacting a provision which would be a deliberate and unworthy sham. They therefore construe the word "discount" as including a proper allowance for risks so as to give to the first option a business reality. In the Supreme Court none of the learned judges (except possibly Estey J.) appears to have regarded the first option as a sham, although they thought it most probable that the second option would be preferred. Rand J. (with whom Kellock J. agreed) went further. He said: "I agree . . . . that the first mode must be interpreted as "a substantial equivalent of the second, in which the obvious "risks of the latter both to the province and to the owner are "commuted in terms of money. The discount must be "sufficient to induce a business judgment to accept it as "fairly related to the chances of loss and benefit; and there "is no more difficulty in estimating such a sum for taxes "than for purchase money" (1). Their Lordships are in agreement with this statement and respectfully adopt it.

1950 A.C. p. 115.

The next point to be noted is that the *land* is to be assessed at its fair market value. It is clear, therefore that the subject-matter of the assessment is, ex facie the land and not the timber standing on it. It is said, however, that this too is a sham on the ground that the only value in the land is due to the fact that it has the timber on it; that the fair market value of the land is the same thing as the fair market value of the timber; and that accordingly the direction to assess the land is mere camouflage to hide the real intention which is to assess the timber. For the sake of the argument their Lordships are prepared to assume that the

(1) [1948] S.C.R. 443.

timber lands in the belt have at present no substantial value beyond the value of the timber, although such a view ignores the possibility of development of parts, at any rate, for other purposes, including replanting. Locke J. described the lands as "largely worthless." Estey J. went further and declared that the land "has no value "apart from the timber." But the assessments, or some of them, may take place in the distant future when parts of the land itself may have acquired a value of their own irrespective of the timber. Their Lordships think that such a possibility cannot be ignored. But, however this may be, the argument appears to their Lordships to confuse the subject-matter of taxation with that element comprised in the subject-matter which gives to it its value for assessment purposes. It simply is not the case that a tax on land is the same thing as a tax on timber, however minute or even non-existent may be the difference in value of the land and of the timber. The importance of this distinction between the land and the timber will appear later, and their Lordships are in agreement with what was said by O'Halloran J.A. on this topic in the following passage: "Because "land bears a tax which is measured by the reflected value "of its products is no reason to say that the tax on the land "is a colourable tax on its products, and that such a tax "is not in truth a tax on the land itself."

Under para. (*c*) it is the owner of the land who is to be taxed, the tax is to be a percentage of the assessed value, and the tax is charged on the land. Now it is possible that the ownership of the land and the ownership of the timber may come into different hands: nevertheless it will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax. The fact that the tax is to be a charge on the land is in their Lordships' opinion of great significance. There is no charge on the cut timber. If a landowner cuts the timber on part of his assessed land and makes default in payment of the tax the Crown will be entitled to enforce its charge not against the timber already cut but against his land, even though the only land of any value is the remainder of the assessed land with the timber trees which stand on it and are part of it. This appears to their Lordships to point clearly to the view that the proposed tax is in truth a tax on the land and not a tax on timber. In relation to the amount of the

1950 A.C. p. 116.

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tax it was argued that what in reality was being aimed at was to compel the payment of a sum arrived at in the same manner as a royalty, and that the valuation required would have to be conducted in the manner required for the fixing of a royalty, i.e., a valuation of the timber made on what is called a "cruise." Reliance was placed on para. 12 of the statement of facts agreed between counsel on December 13, 1946, which says "that questions 4, 5 and 6 are to be con- "sidered on the assumption that the tax would be on a "scale equivalent to the tax recommended by the Com- "missioner." Their Lordships, however, are of opinion that this argument is based on a misconception both of the description of the tax contained in question (6) and also of the paragraph in the agreed statement of facts. That paragraph, they were informed, was agreed merely for the purpose of indicating that the tax might be at least as high as the amount which might have been obtained in the case of a royalty, not that it would necessarily be so. The argument might perhaps have had some substance in the case of question (5), which states that the tax there is to "approximate the prevailing rates of royalty." No such phrase appears in question (6), where the only statement as to the amount of the tax is that it is to be "a percentage of "the assessed value" of the land. It would be for the legislature to fix that percentage which might, of course, but need not, be so calculated as to produce an amount roughly equivalent to what a royalty, had it been payable, might be estimated to have produced. This is far from leading to or supporting the conclusion that the proposal is merely a concealed method of exacting the equivalent of a royalty, or that the assessment would be made on a valuation of the trees only conducted in the same manner as a valuation for royalty purposes.

[1950] A.C. p. 117.

Paragraph (*d*) is expressed in language appropriate for a machinery section as distinct from the charging section, which is para. (*c*). On its face it only deals with the time for payment. Their Lordships have already dealt with the meaning of the first option contained in sub-para. (i). Had they thought that this option was a sham, and intended to be such, it might well have affected their view as to the real nature of the tax. But interpreting it as they do as a real option honestly given they find that para. (*d*) does nothing more than fix two alternative times for payment

of the tax. It would, their Lordships consider, be contrary to sound principles of construction to interpret such an option as doing more than what it purports to do, i.e., to give to the taxpayer the right to choose when he will pay a tax the nature of which has already been fixed and declared. It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land. This is what sub-para. (ii) purports to do, and nothing more. The granting of such an opportunity must in its nature be related to the progressive realization of the value of the timber by cutting: it could not be defined otherwise, and their Lordships do not think it right to interpret language, which of necessity had to be used for that purpose, as establishing or helping to establish the proposition that the tax is really a tax on timber and not on land.

A subsidiary argument was raised in connexion with sub-para. (ii). It was said that the phrase "the value of the trees "cut" must mean their market value at the time of cutting, and that if the value of timber were to fall it might result that all the timber on a piece of land might be cut without a sum sufficient to discharge the whole of the assessment on that piece being obtained. Although the phrase in question is susceptible of this meaning their Lordships are disposed to think that "the value" referred to is intended to refer to the value at the time of the assessment, so that the result suggested would never arise. But in any case, the suggested construction does not, in their Lordships' opinion, give any substantial support to the proposition for which it is used, namely, that the tax is in reality a tax on timber, for the reason that, if the price of timber fell sufficiently, no tax would be payable after all the timber had been cut. Even if that is what the sub-paragraph means when read by itself, it does not appear to their Lordships to follow that the balance of the tax would never have to be paid. The tax is assessed on the owner of the land and it is quite consistent with the language of the question that machinery should be provided for recovering from the owner any amount remaining unpaid after all the timber had been cut. Moreover, it may be added that if, instead of falling, the price of timber were to rise, then, on the construction suggested, the tax might be wholly satisfied before the whole

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of the timber was cut, leaving the owner of the land free to realize the value of the uncut timber without incurring any further tax liability.

The conclusion, therefore, at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands. The proposed tax, it is argued, is really of a different nature since it is an extraordinary tax in the matter of amount, discriminatory because it is only exigible in the case of the railway lands and calculated (and indeed intended) to deprive the railway company of a large part of the benefit originally granted to it by reducing the value of its land. None of these considerations, even if they be regarded as correct, appear to their Lordships to be relevant to the only matter raised by question (6), namely, that of ultra vires. If the tax is a land tax the fact that it specifically affects the company detrimentally cannot make it in "pith and substance" something else, namely, a camouflaged timber tax, however relevant the detriment to the company might have been to the argument (already disposed of) based on the alleged contractual relationship.

There is, indeed, one difference between the proposed tax and the ordinary land tax which must be noted and examined to see how far the analogy is affected. The existing land tax of the province is, as their Lordships understand, an annual tax in the nature of a royalty, whereas what is here proposed is a special impost to be discharged once for all, either as a single discounted sum or by way of a series of instalments. But it does not seem that this distinction assists the respondents in their contention that the tax is in reality a tax on timber.

1950 A.C. p. 119.

It is argued, however, that the tax, whatever name be given to it, is an indirect tax because the natural tendency for the person who is to be assessed to it will be to pass it to others and thus indemnify himself against it. This operation of passing, it is said, would take one or other or both of two forms—a "passing back" to the railway company by means of a lowering of the purchase price, and a "passing "on" to purchasers of the cut timber. It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax

on to the shoulders of another. But this is only an economic tendency. The assessee's efforts may be conscious or unconscious, successful or unsuccessful; they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the "passing on" which is regarded as the hallmark of an indirect tax. Moreover, in all the cases where various forms of tax have been discussed not one instance has been found of what in the present case is described as "passing back." Their Lordships are not prepared to hold that this tendency in the present case produces, or helps to produce, an indirect quality in the tax. Moreover, the tax is assessed after and not before a sale, and may not become payable for a considerable time thereafter. Whatever is "passed back" in the form of economic consequence by way of reduction of purchase price, it cannot be the *tax*. Mill's well-known formula is that a direct tax is one which is demanded from the very persons who it is intended and desired should pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. In *City of Halifax* v. *Fairbanks' Estate* (1), Lord Cave, in delivering the judgment of the Board, used expressions which, if not correctly understood, might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon L.C. in the judgment of the Board in the latter case of *Atlantic Smoke Shops, Ld.* v. *Conlon* (2), those expressions "should not be understood as relieving "the courts from the obligation of examining the real "nature and effect of the particular tax in the present "instance, or as justifying the classification of the tax as "indirect merely because it is in some sense associated "with the purchase of an article." In the latter case a somewhat complicated method of taxing the consumption of tobacco was adopted. It was held to be a direct tax because it was imposed on the actual consumer on the occasion of a purchase by him. A similar result from the revenue point of view could no doubt have been secured by imposing the tax on the manufacturer or on the vendor. But such a tax would have been an indirect tax since the operation of passing the burden of the tax to the consumer

1950 A.C. p. 120.

(1) [1928] A.C. 117.

(2) [1943] A.C. 550, 565.

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in the shape of an increase of price would have been in practice almost automatic. This case, in their Lordships' view, affords a good example of the caution with which the "pith and substance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.

Question (7) was as follows: [His Lordship stated the question and continued:] It is agreed that the relevant section of the Forest Act is 124 and not 123. The Court of Appeal by a majority (O'Halloran J.A. dissenting) held that the levy in question was a service charge and not a tax, and did not derogate from the provisions of s. 22. The Supreme Court unanimously reversed this decision. Their Lordships agree with the Supreme Court. The question is a short one. The exemption conferred by s. 22 is given in the words "The lands . . . . shall not be subject to taxation." There is no context to give to the word "taxation" any special meaning, and the question therefore comes to this: "Is the "impost charged by s. 124 of the Forest Act 'taxation' "within the ordinary significance of that word?" The Forest Act contains an elaborate code relating to the control and administration of forestry and forest lands. These lands form an important part of the national wealth of the province and their proper administration, including in particular protection against fire, is a matter of high public concern, as well as one of particular interest to individuals. Part XI of the Act, consisting of ss. 95 to 127, deals with what is described as "Forest Protection." It contains detailed regulations with regard to the kindling of fires, precautions against fires, fire fighting, compulsory assistance and similar matters. Section 124 provides that from the owners of timber land "there shall be payable "and paid to the Crown on the first day of April in each "year an annual tax at the rate of six cents for each acre." These payments are to be placed to the credit of a fund "in the Treasury to be known as the 'forest protection " 'fund,' " and are made recoverable by action at the suit

1950 A.C. p. 121.

of the Crown. An annual sum of $1,650,000 is to be added out of the consolidated revenue fund. Advances may be made out of the consolidated revenue fund to meet charges incurred before the full collection of the tax or to cover deficiencies. In the case of a deficiency or a surplus there is power to increase or decrease the levy as the case may be. The forest protection fund is applicable for a variety of purposes connected with the protection of forest lands, including the maintenance and equipment of a fire-prevention and protection force, the construction of trails, look-out stations, etc., and the payment of expenditure incurred by any person in fighting fires. The legislature has thus thought it proper to divide the expense of what is a public service of the greatest importance to the province as a whole between the general body of taxpayers and those individuals who have a special interest in having their property protected. The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown. It is suggested, however, that there are two circumstances which are sufficient to turn the levy into what is called a "service charge." They are, first, that the levy is on a defined class of interested individuals and, secondly, that the fund raised does not fall into the general mass of the proceeds of taxation but is applicable for a special and limited purpose. Neither of these considerations appears to their Lordships to have the weight which it is desired to attach to them. The fund is made up partly of the levy and partly by contributions from the taxes paid by the general body of taxpayers. This is no doubt a reasonable apportionment of the burden, for to impose the cost of services which are of general interest to the community as well as a particular interest to a class of individual exclusively on one or the other might well have seemed oppressive. The fact that in the circumstances the persons particularly interested are singled out and charged with a special contribution appears to their Lordships to be a natural arrangement. Nor is the fact that the levy is applicable for a special purpose of any real significance. Imposts of that character are common methods of taxation—taxation for the road fund in this country was a well-known example. The objects of the legislature in adopting such a form of tax may be various. But if it finds it convenient to do so

1950 A.C. p. 122.

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the impost, if in other respects it has the character of a tax, does not thereby change its character.

In the result their Lordships will humbly advise His Majesty that save as regards the answers of the Supreme Court to Questions (4), (5) and (7) this appeal should be allowed. There will be no order as to costs.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for the Esquimalt & Nanaimo Ry. Co., and for the Alpine Timber Co., Ld.: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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CANADIAN PACIFIC RAILWAY COMPANY ..... } APPELLANT;

Nov. 21.

AND

1950 A.C. p. 122.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA ..... } RESPONDENT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS ..... } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—British Columbia—Hours of work legislation—Hotel owned by railway company—Whether part of railway works and undertaking—Applicability of hours of work Act to hotel employees—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91; *s.* 92, *head* 10 *(a) (c)*, 13—*Hours of Work Act, R. S. B. C.* 1936, *c.* 122 *(as amended by c.* 34 *of* 1946).

The appellant, the Canadian Pacific Ry. Co., which owned and managed the Empress Hotel in Victoria, British Columbia, while not denying that the regulation of hours of work was ordinarily a matter of "property and civil rights in the province" under head 13 of s. 92 of the British North America Act, 1867, and accordingly within the legislative competence of the provincial legislature, contended, inter alia, that the company's activities had become such an extensive and important element in the national economy of Canada that the Dominion Parliament was entitled under the general powers conferred by the first part of s. 91 of the Act of 1867 to regulate all the affairs of the company, even where that involved legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92. 1950 A.C. p. 123.

Held, first, that there was neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly fell within the enumerated heads of s. 92 and could not be brought within any of the heads of s. 91 merely because the activities of one of the parties concerned in the matter had created a unified system which was widespread and important in the Dominion.

Principles stated in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896] A. C. 348, at 360-1, held applicable.

Held, secondly, that the hotel was not a part of the company's railway works and undertaking connecting the province of British Columbia with other provinces within the meaning of head 10 *(a)* of s. 92 of the British North America Act so as to be excepted from provincial legislative authority and brought within the Dominion legislative power by virtue of head 29 of s. 91, but was a separate undertaking. The provision in s. 8 of Canadian Pacific Railway Act, 1902, that the company might carry on hotel business "for the comfort and convenience of the travelling "public" did not require the appellant to cater exclusively or specially for those who were travelling on its system. There was little, if anything, in the facts to distinguish the Empress Hotel in regard to its activities from an independently-owned hotel in a similar position.

**Present:* LORD PORTER, LORD GREENE, LORD MORTON OF HENRYTON, LORD REID and RINFRET C.J. of Canada.

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Canadian Pacific Ry. Co. and Canadian Pacific Express Co. v. *Attorney-General for Saskatchewan* [1947] 2 W. W. R. 909, referred to.

Held, thirdly, that for reasons similar to those on which it was held that the hotel was not a part of the railway works and undertaking, it also did not fall within the definition of "railway" in s. 2 (21) of the Railway Act, 1927, and accordingly was not "declared to be a work "for the general advantage of Canada" within the meaning of s. 6 *(c)* of the Act of 1927. It was not therefore excepted under head 10 *(c)* of s. 92 of the British North America Act from provincial legislative competence.

The provisions of the Hours of Work Act, R. S. B. C. 1936, c. 122, as amended in 1946 (c. 34), which provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week, were therefore applicable to, and binding on, the appellant company in respect of its employees employed at the Empress Hotel.

Judgment of the Supreme Court of Canada, [1948] S. C. R. 373, affirmed.

1950 A.C. p. 124.

APPEAL (No. 13 of 1949), by special leave, from a judgment of the Supreme Court of Canada (April 27, 1948) affirming a judgment of the Court of Appeal for British Columbia (March 27, 1947).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: In 1946 the legislature of the province of British Columbia enacted an amendment of the Hours of Work Act, under which it was provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week. The appellant owned and managed the Empress Hotel in Victoria, B.C., and the definition of industrial undertaking in the Hours of Work Act was such as to include a large number of the appellant's employees who worked in that hotel. The appellant did not dispute that, in general, regulation of hours of work was a subject exclusively reserved to provincial legislatures under s. 92 of the British North America Act, 1867; but it was contended for the appellant that it was not within the power of the provincial legislature to regulate the hours of work of any of the employees in the Empress Hotel and that the hours of work of those employees must be determined by an agreement between representatives of the appellant's employees and the appellant which was made binding by an Act of the Parliament of Canada (1947, 11 Geo. VI c. 28 s. 1). That agreement provided for a 48-hour week. To determine that matter an order of reference was made by the Lieutenant-Governor of British Columbia on September 21, 1946,

by which the following question was referred to the Court of Appeal for British Columbia for hearing and consideration. "Are the provisions of the Hours of Work Act, being "chapter 122 of the Revised Statutes of British Columbia, "1936, and amendments thereto, applicable to and binding "upon Canadian Pacific Railway Company in respect of "its employees employed at the Empress Hotel, and if so, "to what extent?"

The facts regarding the Empress Hotel were stated in the order of reference as follows: "The said company has further, "for the purposes of its lines of railway and steamships and "in connexion with its said business, built the Empress Hotel "at Victoria, which it operates for the comfort and con- "venience of the travelling public. The hotel is available "for the accommodation of all members of the public, as "a public hotel. The said hotel caters for public banquets "and permits the use of its hotel ballroom for local functions, "for reward. The property upon which the said hotel is "built is not contiguous to property used by the company "for its line of railway, and is not a terminus for its railway "line or steamships. The company has owned and operated "the said hotel for a period of thirty-eight years, and the "same provides accommodation for large numbers of travel- "lers and tourists from Canada, the United States of America "and elsewhere, having five hundred and seventy-three "rooms. The operation of the hotel is a means of increasing "passenger and freight traffic upon the company's lines of "railway and steamships. The company owns and operates "other hotels elsewhere in Canada for like purposes. There "is a catering department in the hotel wherein the company "employs persons to prepare and serve meals. The company "also employs hotel clerks, bookkeepers and other persons "to do clerical work at the hotel."

1950 A.C. p. 125.

The determination of this appeal depended on the application to the facts of this case of the provisions of ss. 91 and 92 of the British North America Act, 1867. The relevant portions of those sections were:—

"91. It shall be lawful for the Queen, by and with the "advice and consent of the Senate and House of Commons, "to make laws for the peace, order, and good government "of Canada, in relation to all matters not coming within "the classes of subjects by this Act assigned exclusively

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"to the legislatures of the provinces; and for greater "certainty, but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "(notwithstanding anything in this Act) the exclusive "legislative authority of the Parliament of Canada extends "to all matters coming within the classes of subjects next "hereinafter enumerated; that is to say:—

* * * * *

"29. Such classes of subjects as are expressly excepted "in the enumeration of the classes of subjects by this Act "assigned exclusively to the legislatures of the provinces.

"And any matter coming within any of the classes of "subjects enumerated in this section shall not be deemed "to come within the class of matters of a local or private "nature comprised in the enumeration of the classes of "subjects by this Act assigned exclusively to the legis- "latures of the provinces.

1950 A.C. p. 126.

"92. In each province the legislature may exclusively "make laws in relation to matters coming within the classes "of subjects next hereinafter enumerated; that is to say:

* * * * *

"10. Local works and undertakings other than such as "are of the following classes:—

"*(a)* Lines of steam or other ships, railways, canals, "telegraphs, and other works and undertakings con- "necting the province with any other or others of the "provinces, or extending beyond the limits of the "province;

"*(b)* Lines of steam ships between the province and "any British or foreign country;

"*(c)* Such works as, although wholly situate within "the province, are before or after their execution de- "clared by the Parliament of Canada to be for the "general advantage of Canada or for the advantage of "two or more of the provinces.

* * * * *

"13. Property and civil rights in the province.

* * * * *

"16. Generally all matters of a merely local or private "nature in the province."

On March 27, 1947, the Court of Appeal (Sloan C.J.B.C., Robertson, Smith and Bird JJ.A., O'Halloran J.A. dissenting) answered the question in the order of reference in the affirmative. On appeal the Supreme Court of Canada (Kerwin, Taschereau, Rand, Kellock and Estey JJ.) unanimously decided on April 27, 1948, that the judgment of the Court of Appeal for British Columbia should be affirmed and the appeal dismissed. From that judgment this appeal was taken by special leave to His Majesty in Council.

1949. July 13, 14, 18, 19, 20. *C. F. H. Carson K.C.* (Canadian Bar), *Gahan*, and *Allan Findlay* (Canadian Bar) for the appellant. The courts in Saskatchewan in litigation which raised an issue substantially similar to that in the present case have taken a directly contrary view to that of the Supreme Court in this case: *Canadian Pacific Railway and Canadian Pacific Express Co.* v. *Attorney-General for Saskatchewan* (1), which was affirmed on appeal (2). It is submitted in outline for the appellant: *(a)* The appellant has a transportation system which is one integrated system, including ocean marine services; main and branch lines owned and operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of trans-continental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. *(b)* This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. *(c)* The Empress Hotel is an integral part of this unified system. *(d)* Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 of the British North America Act, 1867, assigned exclusively to the legislatures of the provinces: *John Deere Plow Co., Ld.* v. *Wharton* (3). *(e)* Accordingly, the appellant's whole system, inluding its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The jurisdiction of the

1950 A.C. p. 127.

(1) [1947] 4 D. L. R. 329, 331. (2) [1947] 2 W. W. R. 909.
(3) [1915] A. C. 330, 340.

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Dominion Parliament in relation to through railways is mentioned in *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (2), *Toronto Corporation* v. *Canadian Pacific Railway* (3) and *Grand Trunk Railway of Canada* v. *Attorney-General for Canada* (4), in which it was said: "It is not disputed that, in the partition of "duties effected by the British North America Act, 1867, "between the provincial and Dominion legislatures, the "making of laws for through railways is entrusted to the "Dominion" (5). The only proper way to treat the whole of the appellant's system is as a unit which falls outside the whole enumerations of local matters contained in s. 92 of the Act of 1867, and the result is that the only power of legislation which exists in relation to the system regarded in that way is the plenary power of the Dominion Parliament under s. 91. [Reference was also made to *In re The Regulation and Control of Aeronautics in Canada* (6) and *In re The Regulation and Control of Radio Communication in Canada* (7).]

1950 A.C. p. 128.

The next proposition, *(f)* is that even if, contrary to the appellant's contention, any part of the appellant's system could reasonably and properly be regarded as a local work or undertaking, it is submitted *(a)* that the Empress Hotel is included in the appellant's works and undertaking, and on the true interpretation of head 10 *(a)* of s. 92 of the British North America Act comes within the exclusive legislative authority of the Parliament of Canada: *(b)* that, further, the Empress Hotel is included in the works of the appellant declared by the Parliament of Canada under head 10 *(c)* of s. 92 to be for the general advantage of Canada and is also on that ground within the exclusive legislative authority of the Dominion Parliament. If the appellant company as a national transportation undertaking does not come within the exclusive legislative authority of the Parliament of Canada by virtue of the general powers given in s. 91, then the transportation system of the company, including its hotels, is within the exclusive legislative authority of that Parliament by virtue of head 10 *(a)* of s. 92 read with head

(1) [1899] A. C. 367, 371.
(2) [1906] A. C. 204, 210.
(3) [1908] A. C. 54, 58.
(4) [1907] A. C. 65.
(5) Ibid. 67 (A.C.).
(6) [1932] A. C. 54, 77.
(7) [1932] A. C. 304, 314.

29 of s. 91. There is first a question of fact—that the primary purpose of the hotel is to serve the public who use the transportation service of the appellant company—and secondly, the construction of head 10 *(a)*. "Railways" is used in that head in a comprehensive sense to embrace the whole of the works and undertaking of such railway. The majority in the courts below put too narrow an interpretation on head 10 *(a)* when they singled out the head "railways" by itself without giving due weight to the context in which that one word appears. [Reference was made to *Luscar Collieries* v. *McDonald* (1), *Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (2) and *Grand Trunk Railway* v. *James* (3).] The word "railways" in head 10 *(a)* read in conjunction with the words "other works and "undertakings" must be given a comprehensive interpretation and not one which would split the appellant's works and undertakings into bits and pieces, some under Dominion and some under provincial jurisdiction: *Toronto Corporation* v. *Bell Telephone Company of Canada* (4). It was said in the *Regulation and Control of Radio Communication* case (5) that " 'undertaking' is not a physical thing, but is an arrangement "under which, of course, physical things are used." See also *The King* v. *Eastern Terminal Elevator Co.* (6)—an hotel is as much an adjunct to a railway as a grain elevator. As to what is comprised within the works and undertaking of a transportation system some of the judges below relied on *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (7), but it is difficult to understand how that case can be conclusive of the question here. On the true interpretation of head 10 *(a)* the hotel system of the Canadian Pacific Railway, of which the Empress Hotel is a part, would be included in the works and undertaking of the railway.

1950 A.C. p. 129.

Alternatively, it is submitted that apart altogether from the question raised under head 10 *(a)*, the hotels are included in the works under head 10 *(c)* for the general advantage of Canada. By s. 6 *(c)* of the Railway Act, 1927, railways are declared to be works for the general advantage of Canada, and "railway" is defined in s. 2 (21) of the Act of 1927 as meaning, inter alia, "property real or personal and

(1) [1927] A. C. 925.
(2) [1915] A. C. 152.
(3) (1901) 31 S. C. R. (Can.) 420, 432.
(4) [1905] A. C. 52, 59.
(5) [1932] A. C. 304, 315.
(6) [1925] S. C. R. (Can.) 434.
(7) [1922] 1 A. C. 202, 207.

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"works connected therewith" and "any railway bridge, "tunnel or other structure which the company is authorised "to construct." Hotels are not only real property connected with the railway, but are works connected with it. "Con- "nected therewith" cannot mean physically. Also, "other "structure" should be given the interpretation given by MacDonald J. A. in the *Saskatchewan* case (1).

Assuming that the appellant is right on any one of the first three general submissions, i.e., that the hotel is included in the works and undertaking of the appellant company that are within the exclusive legislative authority of the Parliament of Canada either *(a)* by virtue of the general powers conferred by the introductory part of s. 91, or *(b)* by virtue of head 10 *(a)* of s. 92, or *(c)* by virtue of the declaration made under head 10 *(c)* of s. 92, then the next submission is that the regulation of the hours of work of all employees of such works and undertaking is within the exclusive legislative jurisdiction of the Dominion Parliament. The management of such works and undertakings is within the exclusive jurisdiction of the Dominion, and such management includes the regulation of the hours of work of the employees, which is therefore beyond the provincial competence. Hours of work should be uniform throughout the Dominion, and particularly so in the case of a transportation system. If the regulation of hours of work is within exclusive Dominion jurisdiction it is clearly withdrawn from the provincial legislature, and it matters not whether the Dominion has or has not dealt with the subject: *Attorney-General for Canada* v. *Attorney-General for the Province of Quebec and Others* (2). On that view it would not be necessary to consider whether by introducing s. 27A of the Canadian National-Canadian Pacific Act, 1933, which regulates the hours of work of the employees of the appellant company in its hotels, the Dominion had occupied the field. [Reference was also made to *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (3), *In re Alberta Railway Act* (4).] Alternatively, it is submitted that the Dominion in legislating in relation to railway works and undertaking may properly legislate about hours of work as ancillary or incidental

1950 A.C. p. 130.

(1) [1947] 2 W. W. R. 909, 924.
(2) [1947] A. C. 33, 43.
(3) [1899] A. C. 367, 372.
(4) (1913) 48 S. C. R. (Can.) 9; [1915] A. C. 363.

thereto. In the present case the Parliament of Canada has exercised this legislative power by enacting s. 27A, which therefore supersedes the provincial Statute in relation to the Empress Hotel employees. Authorities on the submission that the regulation of hours of work is in the exclusive Dominion field or is ancillary or incidental thereto are *In re Railway Act Amendment*, 1904 (1), *In re Legislative Jurisdiction over Hours of Labour* (2), *Attorney-General for Canada* v. *Attorney-General for Ontario* (3), *In re a Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office* (4) and *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (5). The provincial Act is inoperative in respect of the hotel's employees, and the question referred should have been answered in the negative.

Gahan, and *W. R. Jackett* (Canadian Bar), for the Attorney-General for Canada, intervener, adopted and relied on the argument for the appellant.

J. W. deB. Farris K.C., *H. Alan Maclean* and *John L. Farris* (all of the Canadian Bar) for the respondent, the Attorney-General for British Columbia. First, with regard to the submission that the appellant's system as an integrated system is entirely outside the subjects of s. 92 of the British North America Act, "property and civil rights" under s. 92 (13) is exclusively within the legislative jurisdiction of the province, and if the Dominion right to legislate under s. 91 for peace, order and good government is only in respect of matters not assigned exclusively to the province, it must necessarily follow that there can be no interference with the Hours of Work Act, which deals with property and civil rights under s. 92 (13). For legislation otherwise within provincial jurisdiction to be valid Dominion legislation on the ground of national importance it is essential that the matter of national importance should transcend "property and civil rights": *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (6); *Attorney-General for Canada* v. *Attorney-General for Ontario* (7); *Reference re The Natural Products Marketing Act*, 1934, *and*

1950 A.C. p. 131.

(1) (1905) 36 S. C. R. (Can.) 136, 144; [1907] A. C. 65, 67.
(2) [1925] S. C. R. (Can.) 505, 508.
(3) [1937] A. C. 326, 342, 350.
(4) [1948] S. C. R. (Can.) 248, 257, 271.
(5) [1920] A. C. 184.
(6) [1923] A. C. 695, 703.
(7) [1937] A. C. 326, 353.

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its Amending Act, 1935 (1). The Hours of Work Act comes within the classes of subjects assigned exclusively to the legislatures of the provinces, and the regulation of the hotel business is a matter of local concern or interest and not a matter of national concern. Secondly, the Empress Hotel is not a part of a "railway" within the meaning of head 10 *(a)* of s. 92 of the British North America Act, notwithstanding that the operation of hotels is within the company's statutory powers: Canadian Pacific Railway Act, 1902, s. 8. [Reference was made to *City of Montreal* v. *Montreal Street Ry.* (2) and to the *Radio Communication* case (3).] The determining words in head 10 *(a)* are "connecting the province with any other or others of the provinces." An undertaking of a railway company may be a much wider thing than the undertaking of the railway, and a very careful distinction has to be made between the two. We are concerned here with a matter of substance: it was said in *Shannon* v. *Lower Mainland Dairy Products Board* (4) that "if, on the view of the Statute as a whole, you find that "the substance of the legislation is within the express powers, "then it is not invalidated if incidentally it affects matters "which are outside the authorized field." That supports the submission that the purpose which the directors of the appellant company had in building this hotel does not determine a thing of substance—as to what this hotel is in relation to the railway. While not attempting to base my case only on the following authorities, they do throw some light on the meaning of "railway": *Midland Ry. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction Ry. Co.* (5); *Milner* v. *Great Northern Ry.* (6); *London County Council* v. *Attorney-General* (7). *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (8) has a precise bearing on, and supports, the position of the respondent here. There are no cases which support the argument for the appellant as to what a railway is. [Reference was also made to *Quebec Railway Light & Power Co.* v. *Town of Beaufort* (9), and *Luscar Collieries Ld.* v. *N. S. McDonald* (10), where it was said that "railways are works within the meaning of para. *(a)*,

1950 A.C. p. 132.

(1) [1936] S. C. R. (Can.) 398, 414.
(2) [1912] A. C. 333, 345.
(3) [1932] A. C. 304, 314-6.
(4) [1938] A. C. 708, 720.
(5) (1853) 10 Hare 359, 369.
(6) [1900] 1 Q. B. 795.
(7) [1902] A. C. 165.
(8) [1922] 1 A. C. 202.
(9) [1945] S. C. R. (Can.) 16.
(10) [1925] S. C. R. (Can.) 460, 487.

"because they are mentioned as exceptions from the general "class of local works; so likewise are they works within the "meaning of para. *(c)*"; and, on appeal, the Privy Council agreed with that (1).] "Railway" is not to be given too wide a meaning. It is a class of subject which includes within its ambit *(a)* the physical structure of the railway, including rights of way and appurtenances; *(b)* the physical equipment necessary for the railway as a means of transportation; *(c)* the organization used in connexion with the railway as a means of transportation includes employees; *(d)* a dining room and sleeping accommodation for the use of passengers: it would include a restaurant where necessary for the sustenance of passengers in the actual course of their journey. Hotel systems, however, are not confined to railways, and there is no reason why one system of hotels should have one type of control and other systems a different one. Further, legislation regulating hotels and hotel employees is not legislation "necessarily ancillary" to the legislative power of the Dominion over "railways" so as to justify Dominion legislation in this respect: *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2) is decisive on this point. Also, since it is not ancillary legislation inasmuch as it is strictly property and civil rights, s. 27A has no application.

Next, the Empress Hotel has not been declared a work "for the general advantage of Canada" under head 10 *(c)* of s. 92 of the British North American Act so as to bring the hotel within the exclusive legislative jurisdiction of the Dominion. There is an important question of principle involved in the interpretation of head 10 *(c)*, which is sui generis and is the only provision in the British North America Act which enables the Parliament of Canada to transfer jurisdiction from the province to the Dominion. The declaration must be such as to make it clear what Parliament has done. This declaration in s. 6 *(c)* of the Railway Act, 1927, is one of right, it does not single out hotels at all. If there be any doubt it certainly should be resolved against the appellant's contention. So far as the interpretation of the definition of "railway" in s. 2 (21) of the Act of 1927 is concerned, it was said in *Montreal Trust Co.* v. *Canadian National Ry. Co.* (3) that " 'railway' is defined by the Act in

1950 A.C. p. 133.

(1) [1927] A. C. 925, 932.
(2) [1930] A. C. 111, 118.
(3) [1939] A. C. 613, 625.

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"such a way as to restrict its meaning, unless the context "otherwise requires, to the track and its physical appur- "tenances. Their Lordships are unable to conceive how "providing a residence for an official of the company could "be a purchase of land necessary for the railway as defined "by the Act." Further, as Kellock J. said in the Supreme Court in the present case, "under cl. *(c)* of s. 92 (10 a "declaration may be made only with respect to a work " 'wholly situate within the province,' *Toronto Corporation* "v. *Bell Telephone Company of Canada* (1). The 'railway' "of the appellant company is not so situate." Even assuming, therefore, that the hotel comes within the definition of "railway" in s. 2 (21) the declaration would not be effective with regard to it.

H. Alan Maclean followed. The proper test of what can properly be included in "railway" in head 10 *(a)* was applied by Rand J. in this case: "It is conceivable, also, that dining "rooms and sleeping quarters along its lines, certainly in the "early days of its operation, might well have come within "its public obligations towards passengers and to have been "a necessary part of its railway functions. But I think it "impossible to bring this hotel within that accommodation. "It is a public hotel to which all travellers have a right of "access." That test is both practical and just, and to apply any other would permit the inclusion of almost any activity in connexion with a railway. The hotel business is no part of the "railway," but is a different and separate business which the appellant company is managing for business purposes.

1950 A.C. p. 134.

H. J. Wilson K.C. (Canadian Bar) for the Attorney-General for Alberta, intervener, adopted the argument for the respondent, and dealt only with the point whether the Empress Hotel was within the exceptions of head 10 *(a)* or *(c)* of s. 92. The true position is that the Hours of Work Act is of general application, including hours of work in hotels in the province, and is admittedly prima facie within the jurisdiction of the provincial legislature under heads 10, 13 and 16 of s. 92. Only one real ground has been advanced for taking the Empress Hotel out of the Hours of Work Act, which applies to all other hotels in the province, namely, that it is owned and managed by the Canadian Pacific

(1) [1905] A. C. 52, 60.

Railway Company. It is a novel idea that ownership should determine the legislative jurisdiction of the province with respect to it. On the interpretation of head 10 *(a)* of s. 92 hotels, divorced from railways, cannot possibly come under the words "other works and undertakings connecting the "province," etc., which would be things reasonably necessary to get goods and passengers along the railway to a point outside the province. Applying that test, these hotels are necessarily excluded from the exception. This restricted meaning has been adopted by the courts in many cases, e.g., the *Notre Dame de Bonsecours* case (1), *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Railway and Navigation Co. and City of Vancouver* (2), the dissenting judgment of Duff J. in that case being subsequently affirmed by the Privy Council (3), *In re Alberta Railway Act* (4) and *Montreal Trust Co.* v. *Canadian National Ry. Co.* (5). Reliance is placed on the last cited case as conclusive against the argument for the appellant that "property real or "personal and works connected therewith" in the definition of "railway" in s. 2 (21) of the Railway Act, 1927, includes the Empress Hotel. The appellant company is operating this hotel qua hotel and not qua railway. With regard to head 10 *(c)* of s. 92, it is submitted that s. 6 *(c)* of the Railway Act, 1927, is not an effective declaration under 10*(c)* for the following reasons: first, 10 *(c)* is ineffective and meaningless because the works are already covered by 10 *(a)*; secondly, it has been held that a declaration under 10 *(c)* must be in relation to a work wholly situate within the province and that the subject-matter must be either a specified existing work or one in contemplation before the declaration can be effective: *Reference re Waters and Waterpowers* (6); *Luscar Collieries Ld.* v. *N. S. McDonald* (7). The test is not what the appellant company is empowered to do under its charter—the Act of 1902—but whether the subject-matter in question is one assigned to the province or the Dominion, and applying the well-known test as to pith and substance, true nature and character, the Hours of Work Act must necessarily fall within s. 92 (10), (13)

1950 A.C. p. 135.

(1) [1899] A. C. 367.
(2) (1913) 48 S. C. R. (Can.) 98, 119.
(3) [1914] A. C. 1067, 1074.
(4) 48 S. C. R. (Can.) 9, 39.
(5) [1939] A. C. 613, 625.
(6) [1929] S. C. R. (Can.) 200, 219-20.
(7) [1925] S. C. R. (Can.) 460, 471-83.

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or (16): *In re Insurance Act of Canada* (1); *Lymburn* v. *Mayland* (2).

A. M. Nicol K.C. for the Attorney-General for Saskatchewan, intervener. Legislative jurisdiction as to the limiting of hours of work in industrial undertakings is primarily vested in the province under heads 13 and 16 of s. 92 and is not within Dominion jurisdiction: *Grand Trunk Railway of Canada* v. *Attorney-General for Canada* (3); *In re Alberta Railway Act* (4); *In re Legislative Jurisdiction over Hours of Labour* (5) and *Canadian National Railway and Others* v. *Attorney-General for Saskatchewan* (6). The Empress Hotel is not a railway or an integral or essential part thereof, or a work and undertaking falling within the legislative jurisdiction of the Dominion under head 10 *(a)* of s. 92. Neither does it come within Dominion jurisdiction under 10 *(c)* of s. 92 as it has not been declared by the Parliament to be a work for the general advantage of Canada or for the advantage of two or more of the provinces. [Reference was made to *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (7). *Ladore* v. *Bennett* (8), *Reference as the Validity of s.* 31 *of the Municipal District Act Amendment Act,* 1941, *Alberta Statute, c.* 53, *and as to the Operation thereof* (9) and *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (10).] Section 27A of the Canadian National-Canadian Pacific Act, 1933, purports to regulate labour relations and matters of property and civil rights between the company and its hotel employees and is therefore ultra vires the Parliament of Canada.

1950 A.C. p. 136.

J. W. de B. Farris K.C., H. Alan Maclean and *John L. Farris* for the Attorney-General for Ontario, intervener, adopted the case for the respondnet.

C. F. H. Carson K.C. replied. It was said that the Dominion only had jurisdiction under the opening words of s. 91 where there was something in the nature of an emergency, but it is stated in the *John Deere Plow Co.* case (11) that "the expression 'civil rights in the province' is a very "wide one, extending, if interpreted literally, to much of the

(1) [1932] A. C. 41, 45.
(2) [1932] A. C. 318, 324.
(3) [1907] A. C. 65, 68.
(4) 48 S. C. R. (Can.) 9, 38.
(5) [1925] S. C. R. (Can.) 505.
(6) [1948] 1 D. L. R. 580, 585.
(7) [1920] A. C. 184.
(8) [1939] A. C. 468, 482.
(9) [1943] S. C. R. (Can.) 295.
(10) [1949] A. C. 110.
(11) [1915] A. C. 330, 340.

"field of the other rights of s. 92 and also to much of the "field of s. 91." With regard to head 10 *(a)* of s. 92, the question is what is the genuine purpose for which the hotel was provided, and if it was to provide refreshment, comfort and convenience for the travelling public then without doubt this hotel was plainly an integral part of the railway. It was built as part of the railway and steamship business and is being operated to-day for that purpose. The general principle applicable where there is a conflict of jurisdiction was stated in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), and applying that here the provincial legislation would not be applicable to the Empress Hotel. The regulation of hours of work would be within the exclusive legislative jurisdiction of the Dominion. Section 27A is plainly valid Dominion legislation.

Nov. 21. The judgment of their Lordships was delivered by LORD REID, who stated the facts and statutory provisions set out above and continued: The inter-relation of ss. 91 and 92 has frequently been the subject of litigation and certain principles have emerged which their Lordships think it well to recall in view of the nature of the arguments submitted for the appellant in this case. Three matters are dealt with in ss. 91 and 92: first, the general power to make laws for the peace, order, and good government of Canada conferred on the Parliament of Canada by the first part of s. 91; secondly, the classes of subjects enumerated in the latter part of s. 91 as being within the exclusive legislative authority of the Parliament of Canada; and thirdly, the classes of subjects enumerated in s. 92 as being within the exclusive legislative authority of the provincial legislatures. The following propositions were stated in the judgment of their Lordships, delivered by Lord Tomlin, in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2) and were approved in *In re The Regulation and Control of Aeronautics in Canada* (3) and *In re Silver Brothers Ld.* (4):— 1950 A.C. p. 137.

"(1) The legislation of the Parliament of the Dominion, "so long as it strictly relates to subjects of legislation "expressly enumerated in s. 91, is of paramount authority, "even though it trenches upon matters assigned to the

(1) [1943] A. C. 356, 370.
(2) [1930] A. C. 111, 118.
(3) [1932] A. C. 54.
(4) [1932] A. C. 514.

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"provincial legislatures by s. 92: see *Tennant* v. *Union* "*Bank of Canada* (1).

"(2) The general power of legislation conferred upon the "Parliament of the Dominion by s. 91 of the Act in supple- "ment of the power to legislate upon the subject expressly "enumerated must be strictly confined to such matters "as are unquestionably of national interest and import- "ance, and must not trench on any of the subjects "enumerated in s. 92 as within the scope of provincial "legislation, unless these matters have attained such "dimensions as to affect the body politic of the Dominion: "see *Attorney-General for Ontario* v. *Attorney-General for* "*the Dominion* (2).

"(3) It is within the competence of the Dominion "Parliament to provide for matters which, though other- "wise within the legislative competence of the provincial "legislature are necessarily incidental to effective legisla- "tion by the Parliament of the Dominion upon a subject "of legislation expressly enumerated in s. 91: see *Attorney-* "*General of Ontario* v. *Attorney-General for the Dominion* "(3); and *Attorney-General for Ontario* v. *Attorney-General* "*for the Dominion* (2).

"(4) There can be a domain in which provincial and "Dominion legislation may overlap, in which case neither "legislation will be ultra vires if the field is clear, but if the "field is not clear and the two legislations meet the "Dominion legislation must prevail: see *Grand Trunk* "*Ry. of Canada* v. *Attorney-General of Canada* (4)."

The appellant in this case relies on the last part of the second of the above propositions and on the following passage in the judgment delivered by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (5) which is there referred to.

1950 A.C. p. 138.

"Their Lordships do not doubt that some matters, in "their origin local and provincial, might attain such dimen- "sions as to affect the body politic of the Dominion, and "to justify the Canadian Parliament in passing laws for "their regulation or abolition in the interest of the Domin- "ion. But great caution must be observed in distinguish-

(1) [1894] A. C. 31.
(2) [1896] A. C. 348.
(3) [1894] A. C. 189.
(4) [1907] A. C. 65.
(5) [1896] A. C. 348, 361.

"ing between that which is local and provincial, and "therefore within the jurisdiction of the provincial "legislatures, and that which has ceased to be merely "local or provincial, and has become matter of national "concern, in such sense as to bring it within the jurisdic- "tion of the Parliament of Canada."

The first argument submitted for the appellant sought to bring this case within the class of case last referred to. The appellant's argument may be stated in this way: The appellant has a transportation system which is one integrated system including ocean marine services; main and branch lines owned or operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of transcontinental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. The Empress Hotel, as the material in the record shows, is an integral part of this unified system. Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 assigned exclusively to the legislatures of the provinces. Accordingly, the appellant's whole system, including its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The appellant does not deny that regulation of hours of work is ordinarily a matter of property and civil rights which falls under head 13 of s. 92. The basis of this argument must be that the Canadian Pacific Railway Company's activities have become such an extensive and important element in the national economy of Canada that the Canadian Parliament is now entitled under the general powers conferred by the first part of s. 91 to regulate all the affairs of that company, even where this involves legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92.

1950 A.C. p. 139.

There are many companies beside the appellant whose businesses extend over all, or most of, the provinces. It

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was not, and could not be, suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies. The argument must be that, while the activities of those other companies, or most of them, in relation to the subjects enumerated in s. 92 remain of such a local or private nature that provincial legislatures retain the exclusive right to legislate in relation to them, the activities of the appellant in relation to those subjects are so different that s. 92 no longer applies to them. This is a novel argument in relation to transcontinental railways. Many cases have been litigated in which this argument would have been relevant. Many of these cases were of the greatest importance and several have come before this Board. It is not suggested that any new circumstances have emerged which would make this argument more appropriate in this case than in certain of the earlier cases, and it is very late in the day to bring forward an argument of this character. Nevertheless, their Lordships will deal with it.

The British North America Act is not silent on the subject of railways and railway undertakings: s. 92, head 10, read in conjunction with s. 91, head 29, lays down with regard to this subject what shall be within the competence of provincial legislatures and what within the competence of the Parliament of Canada. Their Lordships will have to give close examination to this matter in dealing with the next argument for the appellant. If the appellant were to succeed in that argument the argument now under examination would be unnecessary. The present argument is that, even if the line of division laid down in the Act leaves the regulation of the hours of work of the employees with whom this case is concerned within the exclusive competence of the provincial legislature, yet there are overriding considerations arising from the position of the appellant which make that line of division inapplicable to this case. The appellant claims that its undertaking is not of a local or private nature. Let it be admitted for the purpose of this argument that that is so. But in dealing with this general question the position of the employees affected and of those who use the hotel is not irrelevant. From the point of view of an employee who resides in British Columbia, the regulation of his hours of work is as much a matter of civil right in the province whether he is employed by the appellant or by some other corporation. It is true that many matters

1950 A.C. p. 140.

which from one aspect are local and fall within the scope of s. 92 are nevertheless withdrawn from the competence of the provincial legislature, but that is by virtue of the terms of the last sentence of s. 91. That provision makes it clear that a matter which is truly one of civil rights in the province will be withdrawn from the provincial legislature and come within the competence of the Parliament of Canada if it comes within, or is necessarily incidental to, any of the subjects enumerated in s. 91 or expressly excepted from s. 92. But their Lordships can find neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly falls within the enumerated heads in s. 92 and cannot be brought within any of the enumerated heads in s. 91 merely because the activities of one of the parties concerned in the matter have created a unified system which is widespread and important in the Dominion. "It is interesting to notice how often the words "used by Lord Watson in *Attorney-General for Ontario* v. "*Attorney-General for the Dominion* (1) have unsuccessfully "been used in attempts to support encroachments on the "provincial legislative powers given by s. 92. They laid "down no principle of constitutional law, and were cautious "words intended to safeguard possible eventualities which "no one at the time had any interest or desire to define" (*Attorney-General for Canada* v. *Attorney-General for Ontario* (2)). In their Lordships judgment the present case is very different from any of those exceptional cases to which the words used by Lord Watson are applicable. It must be borne in mind that the passage quoted above from the judgment delivered by Lord Watson follows on, and must be read together with, the following passage in the same judgment:—

"The general authority given to the Canadian Parlia-
"ment by the introductory enactments of s. 91 is 'to make
" 'laws for the peace, order, and good government of
" 'Canada, in relation to all matters not coming within
" 'the classes of subjects by this Act assigned exclusively
" 'to the legislatures of the provinces'; and it is declared,
"but not so as to restrict the generality of these words,
"that the exclusive authority of the Canadian Parliament
"extends to all matters coming within the classes of

1950 A.C. p. 141.

(1) [1896] A. C. 348.

(2) [1937] A. C. 326, 353.

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"subjects which are enumerated in the clause. There may, "therefore, be matters not included in the enumeration, "upon which the parliament of Canada has power to "legislate, because they concern the peace, order, and good "government of the Dominion. But to those matters "which are not specified among the enumerated subjects "of legislation, the exception from s. 92, which is enacted "by the concluding words of s. 91, has no application; "and, in legislating with regard to such matters, the "Dominion Parliament has no authority to encroach upon "any class of subjects which is exclusively assigned to "provincial legislatures by s. 92. These enactments appear "to their Lordships to indicate that the exercise of legis- "lative power by the Parliament of Canada, in regard to "all matters not enumerated in s. 91, ought to be strictly "confined to such matters as are unquestionably of "Canadian interest and importance, and ought not to "trench upon provincial legislation with respect to any of "the classes of subjects enumerated in s. 92. To attach "any other construction to the general power which, "in supplement of its enumerated powers, is conferred "upon the Parliament of Canada by s. 91, would, in their "Lordships opinion, not only be contrary to the intend- "ment of the Act, but would practically destroy the au- "tonomy of the provinces. If it were once conceded that "the Parliament of Canada has authority to make laws "applicable to the whole Dominion, in relation to matters "which in each province are substantially of local or "private interest, upon the assumption that these matters "also concern the peace, order, and good government of "the Dominion, there is hardly a subject enumerated "in s. 92 upon which it might not legislate, to the ex- "clusion of the provincial legislatures" (1).

In their Lordships' judgment these principles apply to the present case and they therefore do not accept the first argument for the appellant.

The second argument submitted for the appellant was on more familiar lines depending on the construction of head 10 *(a)* of s. 92. Head 29 of s. 91 brings within the legislative authority of the Parliament of Canada any matter expressly excepted in the enumeration of classes of subjects in s. 92;

1950 A.C. p. 142.

(1) [1896] A. C. 360-1.

and, as paragraphs *(a)*, *(b)* and *(c)* of head 10 of s. 92 are exceptions from that head, it follows that if the Empress Hotel can be brought within the scope of any of these paragraphs it must come within the scope of s. 91. If the Hotel could be shown to be within the scope of s. 91 that would open the way for an argument that regulation of the hours of work of those who work in it must also be within the scope of that section and therefore a matter within the legislative authority of the Parliament of Canada. Paragraph *(b)* of head 10 is not relevant in this case, but the appellant founded on both paragraphs *(a)* and *(c)*. The arguments founded on these paragraphs are different and it will be convenient to deal with them separately.

Head 10 *(a)* begins by specifying four classes, "Lines of "steam or other ships, railways, canals, telegraphs," it then adds another class "and other works and undertakings," and then concludes with qualifying words, "connecting the "province with any other or others of the provinces, or "extending beyond the limits of the province." Their Lordships have no doubt that these qualifying words apply not only to the words which immediately precede them—"other works and undertakings"—but also to each of the four classes specified at the beginning of the paragraph. A more difficult question is the scope which should be attributed to the words "lines of" at the beginning of the paragraph: must it be held that the four specified classes are lines of steam and other ships, lines of railways, lines of canals, and lines of telegraphs; or do the words "lines of" only apply to "steam and other ships" so that the other specified classes are not lines of railways, etc., but are simply railways, canals, and telegraphs? In their Lordships' judment the latter construction is correct. The context shows that each of the four specified classes is intended to be a class of "works and undertakings." Head 10 begins by referring to local works and undertakings, and the phrase which follows the four specified classes is "other works "and undertakings." The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of inter-provincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object the phrase "lines of ships" is appropriate: that phrase is commonly used to denote not only the ships concerned but also the

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organization which makes them regularly available between certain points. But the phrase "lines of railways" would not normally have a similar meaning: it would refer rather to railway tracks and those things which are necessarily incidental to their use and would not be appropriate to denote the undertaking which provides regular travelling facilities. In their Lordships' view the structure of the paragraph does not require that the words "lines of" shall be held to qualify the word "railways"; and to read in those words would tend to defeat the purpose of the paragraph and would introduce a difficult and, perhaps, unworkable distinction between those parts of a railway undertaking which could properly be denoted by the term "lines of railways" and would therefore be within the legislative authority of the Parliament of Canada, and those parts of the undertaking which could not be so regarded.

The question for decision, therefore, is, in their Lordships' view, whether the Empress Hotel is a part of the appellant's railway works and undertaking connecting the province of British Columbia with other provinces or is a separate undertaking. A company may be authorized to carry on, and may in fact carry on, more than one undertaking. Because a company is a railway company it does not follow that all its works must be railway works or that all its activities must relate to its railway undertaking. By the Canadian Pacific Railway Act, 1902, the appellant was authorized to build and operate hotels (s. 8), to engage in mining and other activities (s. 9), to construct and operate electric generating stations (s. 10) and to exercise the powers of an irrigation company (s. 11). The powers conferred by s. 9 were expressed to be for the purpose of enabling the appellant to utilize its land grant. It was held in *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (1) that subsidy lands were not held by the company as part of its railway or of its undertaking as a railway company and were not withdrawn from the legislative authority of the provincial legislature: and it could hardly be suggested that buildings erected on such lands for the purpose of carrying on mining or other activities authorized by s. 9 of the appellant's Act are works coming within the scope of head 10 *(a)* of s. 92. In the case of other works or other activities it may be difficult to determine whether or not they are part of the company's

(1) [1922] 1 A. C. 202.

railway works and undertaking and the question may depend both on the terms of the section authorizing them and on the facts of the case. Section 8 of the appellant's Act of 1902 is in the following terms: "the Company may, for the purposes "of its railway and steamships and in connexion with its "business, build, purchase, acquire or lease for hotels and "restaurants, such buildings as it deems advisable and at "such points or places along any of its lines of railway and "lines operated by it or at points or places of call of any "of its steamships, and may purchase, lease and hold the "land necessary for such purposes, and may carry on busi- "ness in connexion therewith for the comfort and convenience "of the travelling public, and may lay out and manage parks "and pleasure grounds upon the property of the Company "and lease the same from or give a lease thereof to any person, "or contract with any person for their use, on such terms as "the Company deems expedient."

This section limits the places where the appellant may build or operate hotels, but it does not limit the classes of hotel business which may be carried on therein. Their Lordships do not read the authority to carry on business "for the comfort and convenience of the travelling public" as requiring the appellant to cater exclusively or specially for those who are travelling on its system. The appellant is free to enter into competition with other hotel keepers for general hotel business. It appears from the facts stated in the order of reference that the appellant has so interpreted its powers and that in the Empress Hotel it does carry on general hotel business. It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant's system may be a part of its railway undertaking whether that provision is made in trains or at statious, and such provision might be made in a hotel. But the Empress Hotel differs markedly from such a hotel. Indeed, there is little, if anything, in the facts stated to distinguish it from an independently owned hotel in a similar position. No doubt the fact that there is a large and well-managed hotel at Victoria tends to increase the traffic on the appellant's system; it may be that the appellant's railway business and

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hotel business help each other, but that does not prevent them from being separate businesses or undertakings.

In dissenting from the judgment of the Court of Appeal in this case, O'Halloran J.A. said: "But the undertaking of the "Canadian Pacific Railway Company is one single under- "taking and is not a collection of separate and distinct "businesses." His view was that because the hotel provides for the comfort and convenience of travellers it is an integral link in the appellant's transportation system, and that, as the other business done by the hotel cannot be severed from services to the appellant's passengers, the whole must be within the railway undertaking. For the reasons already given their Lordships are unable to agree with this view. In *Canadian Pacific Railway Company and Canadian Pacific Express Co.* v. *Attorney-General for Saskatchewan* (1) one of the questions decided by the Court of Appeal for Saskatchewan was that the Hours of Work Act of that province did not apply to employees in the appellant's hotels in that province. MacDonald J.A., in delivering the judgment of the court, adopted the reasoning of O'Halloran J.A. to which reference has already been made and held that the hotels formed an adjunct of the appellant's "works and under- "takings." If by that the learned judge meant that they formed a part of the railway undertaking then their Lordships are unable to reach that conclusion with regard to the Empress Hotel: but, if it was meant that the hotels, though not forming a part of the railway undertaking, were of service to it, then that, in their Lordships' view, is not enought to bring them within the scope of the exceptions to head 10 of s. 92.

Their Lordships were referred to a definition of "Pacific "Railways" in an Act of the Parliament of Canada (Statutes of Canada 1932-33 (23 & 24 Geo. V c. 33)) where the appellant's hotel system was specifically included in that definition. But that Act was passed for a particular purpose, and in any event that definition cannot affect the meaning of the word "railways" in the British North America Act, 1867. Their Lordships would add that if this hotel, or the appellant's chain of hotels, is regarded as separate from its railway undertaking, then those hotels cannot come under the words "other works and undertakings connecting with

(1) [1947] 2 W. W. R. 909.

"the province with any other or others of the provinces, "or extending beyond the limits of the province" because the hotels considered separately from the railway system do not connect one province with another. Their Lordships therefore hold that the Empress Hotel does not come within the scope of head 10 *(a)* of s. 92.

The third argument submitted for the appellant sought to bring the Empress Hotel within the scope of head 10 *(c)* of s. 92. If this argument is to succeed it is necessary to find that the hotel, or something which includes the hotel, has been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of its provinces. There is no declaration by the Parliament of Canada which specifically mentions either this hotel or the appellant's hotels generally; but it is contended for the appellant that the declaration contained in s. 6 *(c)* of the Railway Act, 1927 (Statute of Canada 1927 c. 170) is wide enough to embrace the appellant's hotels, including the Empress Hotel. This was not the first declaration by the Parliament of Canada with regard to railways. In an Act of 1883 (46 Vict. c. 24) amending the Consolidated Railway Act, 1879, it was declared in s. 6 that certain specified lines of railway, including the Canadian Pacific Railway, are works for the general advantage of Canada, and that every branch line or railway then or thereafter connecting with or crossing any of the specified lines of railway is a work for the general advantage of Canada. Declarations in substantially the same terms were contained in the Railway Act, 1886, s. 121, and the Railway Act, 1888, s. 306. It would be difficult to maintain that these declarations included anything beyond strictly railway works; but that question need not be further considered because in 1919 a wider form of declaration was enacted, and this form of declaration was repeated in 1927 and is still in force. In both the Railway Act, 1919, and the Railway Act, 1927, s. 6 *(c)* is in the following terms:—

1950 A.C. p. 146.

"The provisions of this Act shall, without limiting the "effect of the last preceding section, extend and apply to:—

* * * * *

"*(c)* every railway or portion thereof, whether con- "structed under the authority of the Parliament of Canada "or not, now or hereafter owned, controlled, leased, or

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"operated by a company wholly or partly within the "legislative authority of the Parliament of Canada, or "by a company operating a railway wholly or partly "within the legislative authority of the Parliament of "Canada, whether such ownership, control or first "mentioned operation is acquired or exercised by pur- "chase, lease, agreement or other means whatsoever, "and whether acquired or exercised under authority of "the Parliament of Canada, or of the legislature of any "province, or otherwise howsoever; and every railway or "portion thereof, now or hereafter so owned, controlled, "leased or operated shall be deemed and is hereby "declared to be a work for the general advantage of "Canada."

1950 A.C. p. 147.

In both the Railway Act, 1919, and the Railway Act, 1927, s. 2 (21) provides that unless the context otherwise requires " 'railway' means any railway which the company has "authority to construct or operate, and includes all branches, "extensions, sidings, stations, depots, wharves, rolling stock, "equipment, stores, property real or personal and works "connected therewith, and also any railway bridge, tunnel "or other structure which the company is authorized to "construct; and, except where the context is inapplicable, "includes street railway and tramway."

It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in s. 6 *(c)*. In their Lordships' judgment that is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being included in the definition of "railway" indicates that the word "railway" by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of, or used in connexion with the operation of, a railway system. The appellant founded on two general phrases which occur in the definition—"property real or personal "and works connected therewith" and "other structure "which the company is authorized to construct." With regard to the first of these phrases their Lordships are of opinion that, the words "connected therewith" qualify the whole phrase and refer back to the preceding words, and therefore property which is not connected with the railway

system is not included: with regard to the second phrase, the context shows that these words were not intended to bring in structures which have no connexion with a railway system merely because a railway company was authorized to construct them. The appellant is authorized by the Canadian Pacific Railway Act, 1902, to carry on a variety of undertakings, including mining, electricity supply and irrigation: it cannot have been intended that structures erected solely for the purposes of these undertakings and having no connexion with the railway system should be included within this definition of "railway." Accordingly, the Empress Hotel could only come within the scope of the definition if it could be regarded as connected with the appellant's railway system or railway undertaking. Their Lordships have already held that that hotel is not part of the appellant's railway or railway works and undertaking within the meaning of s. 92 (10) of the British North America Act, 1867: for similar reasons they hold that it does not come within the scope of the declaration enacted by the Parliament of Canada in s. 6 *(c)* of the Railway Act, 1927. It is therefore unnecessary for their Lordships to consider the argument that this declaration is not a valid declaration. In *Luscar Collieries* v. *McDonald* (1) their Lordships stated that they wished it "distinctly to be "understood that so far as they are concerned the question "as to the validity of s. 6 *(c)* of the Act of 1919 is to be "treated as absolutely open." Section 6 *(c)* of the Act of 1927 is in the same terms, and the question of its validity, remains absolutely open so far as their Lordships are concerned.

1950 A.C. p. 148.

It is also unnecessary for their Lordships to express any opinion on the question whether, if the Empress Hotel could be brought within the scope of either head 10 *(a)* or head 10 *(c)* of s. 92 of the British North America Act, 1867, regulation of the hours of work of persons employed in it would be either within the exclusive legislative authority of the Parliament of Canada or within the domain in which provincial and Dominion legislation may overlap. As their Lordships hold that the general power conferred on the Parliament of Canada by the first part of s. 91 does not apply in this case and that this hotel does not come within the scope

(1) [1927] A. C. 925, 933.

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1950 A.C. p. 149.

of either head 10 *(a)* or head 10 *(c)* of s. 92 it follows that regulation of the hours of work of those employed in this hotel is within the exclusive legislative authority of the legislature of the province of British Columbia and that the question in the order of reference was rightly answered in the affirmative by the Canadian courts.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the parties have agreed that there should be no costs of the appeal their Lordships make no order as to costs.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent, and for the Attorney-General for Ontario, intervener: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada, intervener: *Charles Russell & Co.*

Solicitirs for the Attorneys-General for Saskatchewan and Alberta, interveners: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J.C.*
1950
Oct. 16.

1951 A.C.
p. 179.

In re A REFERENCE AS TO THE VALIDITY OF SECTION 5 *(a)* OF THE DAIRY INDUSTRY ACT, R.S.C. 1927, c. 45.

CANADIAN FEDERATION OF AGRICULTURE..... } APPELLANTS;

AND

ATTORNEY-GENERAL FOR QUEBEC AND OTHERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Canada—Constitutional law—Dairy Industry Act, R. S. C. 1927, *c.* 45, *s.* 5 *(a)*—*Legislative competence—Whether ultra vires Dominion Parliament—In relation to "civil rights" in the province—British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (2) (27); *s.* 92 (13); *s.* 95.

By s. 5 *(a)* of the Dairy Industry Act, R. S. C. 1927, c. 45: "No person "shall manufacture, import into Canada, or offer, sell or have in his "possession for sale, any oleomargarine, margarine, butterine, or other "substitute for butter, manufactured wholly or in part from any fat "other than that of milk or cream".

The prohibition of the manufacture, offer, sale, or possession for sale of the goods mentioned in s. 5 *(a)* of the Dairy Industry Act—the object of which was to protect and encourage the dairy industry—was ultra vires the Parliament of Canada, for the prohibition relates to "civil rights in "the Province", a subject-matter within the exclusive legislative competence of the Provincial legislatures under head 13 of s. 92 of the British North America Act, 1867.

By that prohibition every citizen of a province is prohibited from manufacturing and selling the named substances, even if he manufactures and sells them only in that province. The "regulation of trade and "commerce", which was assigned to the Dominion legislature by head 2 of s. 91 of the Act of 1867, having been held by the Board in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (the natural-products marketing case) [1937] A. C. 377 not to permit "the regulation "of individual forms of trade or commerce confined to the province", a fortiori, the prohibition of individual forms of trade and commerce confined to the province is not permitted under s. 91 (2). The prohibition in question was typical of those in which the Board had felt bound to put some limit on the scope of the wide words of head 2 of s. 91 "in order", as stated by Duff, J., in *Lawson* v. *Interior Tree Fruit & Vegetable Committee of Direction* [1931] S. C. R. (Can.) 357, at p. 366, "to preserve from "serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess". 1951 A.C. p. 180.

Secondly, the prohibition in s. 5 *(a)* is in pith and substance a law for the protection and encouragement of the dairy industry in Canada, and the fact that, incidentally, penalties are provided for any breach of the prohibition is not sufficient per se to make the prohibition a law

* *Present:* LORD PORTER, LORD SIMONDS, LORD MORTON OF HENRYTON, LORD MACDERMOTT AND LORD RADCLIFFE.

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"for the peace, order and good government of Canada in relation to the "criminal law" within the meaning of head 27 of s. 91, so as to fall within the exclusive legislative competence of the Dominion Parliament.

Attorney-General for Ontario v. *Reciprocal Insurers* [1924] A. C. 328, 340, applied.

Dictum of Rand, J., in his judgment in the present case [1949] S. C. R. (Can.) at p. 50, approved and adopted.

Thirdly, the prohibition relates to "civil rights" within each of the provinces, which are within exclusive provincial legislative competence under head 13 of s. 92, and there were no facts here which led to the conclusion that there existed conditions which might override the normal distribution of powers in ss. 91 and 92 and justify the prohibition as falling within the "residuary power" conferred on the Dominion by the opening words of s. 91.

Attorney-General for Canada v. *Attorney-General for Ontario* [1937] A. C. 326, 352-3, and *Attorney-General for Ontario* v. *Canada Temperance Federation* [1946] A. C. 193, 205, considered.

Lastly, the prohibition is not within Dominion legislative competence as a law "in relation to agriculture" within s. 95 of the Act of 1867. Although the prohibition might well "produce a favourable effect on the "strength and stability" of the dairy industry, that fact alone, as indicated by the Board in *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*]1949] A. C. 110, at pp. 122-3, is not sufficient to make it legislation "in relation to agriculture" within s. 95. The connexion between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition within the terms of s. 95.

Lower Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy Ld.* [1933] A. C. 168, 173, 174, applied.

Decision of the Supreme Court of Canada [1949] S. C. R. (Can.) 1, affirmed.

APPEAL (No. 30 of 1949), by special leave, from a decision of the Supreme Court of Canada (December 14, 1948) pronounced on a reference by the Governor-General in Council dated July 27, 1948.

The only question referred to the Supreme Court for hearing and consideration was:—"Is s. 5 *(a)* of the Dairy "Industry Act, R.S.C. 1927, c. 45, ultra vires of the Parlia- "ment of Canada either in whole or in part and if so in "what particular or particulars and to what extent?"

1951 A.C. p. 181.

Section 5 *(a)* of the Dairy Industry Act is in the following terms:—"5. No person shall—*(a)* manufacture, import into "Canada, or offer, sell or have in his possession for sale, "any oleomargarine, margarine, butterine, or other substi- "tute for butter, manufactured wholly or in part from any "fat other than that of milk or cream".

The judgment of the Supreme Court (Rinfret, C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Locke, JJ.) was expressed as follows:—"(1.) The prohibition of importa-

"tion of the goods mentioned in the section is intra vires of "Parliament, Locke, J., finds s. 5 *(a)* of the Dairy Industry "Act to be ultra vires while expressing no opinion as to the "power of Parliament to ban importation by appropriate "legislation. (2.) The prohibition of manufacture, offer, "sale, or possession for sale of the goods mentioned is "ultra vires of Parliament, the Chief Justice and Kerwin J., "dissenting".

1950. June 21, 22, 26, 27, 28 and 29. *F. P. Varcoe, K.C.*, *W. R. Jackett, K.C.* (both of the Canadian Bar), and *Gahan* for the Attorney-General for Canada, in support of the appeal. The purpose of this legislation was to give certain protection and encouragement to the dairy industry. Some preliminary matters may be recalled at the outset. First, *Canadian Pacific Wire Co.* v. *Tuley* (1) illustrates how the rules of construction have been applied to ss. 91 and 92 of the British North America Act, 1867. Secondly, the rule has been laid down that a matter not within the legislative competence of the provincial legislatures under s. 92 falls within s. 91: *Russell* v. *Reg.* (2). Similarly, whatever falls within the enumeration of s. 91 is excluded from s. 92. Next, a distinction has been drawn between legislation which is "in relation to" a subject-matter, and legislation which "affects" it: *Gold Seal Ld.* v. *Attorney-General for Alberta* (3). Then, the true nature and character of the legislation in a particular instance must always be determined in order to ascertain the class of subject to which it belongs—that is the pith and substance doctrine. Finally, there is the double-aspect doctrine—that in one aspect and for one purpose the legislation falls within s. 91, and for another purpose in another aspect within s. 92. While, as to the prohibition of manufacture and sale, the legislation now in question may in one aspect fall within the provincial field as being in relation to a local and private matter within the province, it may nevertheless in another aspect fall within the Dominion power under various heads of s. 91.

The first main submission is that s. 5*(a)* of the Dairy Industry Act is legislation in relation to "the regulation of "trade and commerce" and therefore validly enacted under head 2 of s .91 of the British North America Act, 1867. 1951 A.C. p. 182.

(1) [1921] 2 A. C. 417, 422.
(2) (1882) 7 App. Cas. 829, 842.
(3) (1921) 62 S. C. R. (Can.) 424, 460.

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Secondly, s. 5 *(a)* and the appropriate penal provision in s. 10 of the Act, is legislation in relation to "the criminal law" under s. 91, head 27, of the Act of 1867. Thirdly, s. 5 *(a)* is a law in relation to a matter not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and is therefore within the residuary power conferred by the opening words of s. 91. In most of the following authorities the three above-mentioned propositions have been considered. All that *Citizens Insurance Company of Canada* v. *Parsons* (4) decided was that the restriction on the regulation of trade and commerce in that case was to the effect that contracts in a particular trade were outside s. 91, head 2. *Russell* v. *Reg.* (2) was a case of the same order as the present, and it was said that the prohibition in that case was not "property and civil rights". *Hodge* v. *Reg.* (5) was held to be a valid regulative statute, and was the basis of the restrictions which have been placed on the ordinary meaning of "trade and commerce".

Next, *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (6) shows that if a matter falls within the exclusive legislative power of the province the Dominion has no power to displace that, but that circumstances may arise where the subject has a different aspect, and then the legislative power under peace, order and good government in s. 91 comes to be exercisable by the Dominion. It was held in that case *(a)* that the Canada Temperance Act was valid under the opening part of s. 91; *(b)* that it was not valid under s. 91, head 2. *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (7) shows that the prohibition of manufacture and sale in the province by the provincial legislature must be under head 16 of s. 92, that is, by a law in relation to a matter of a merely local or private nature in the province, and not under s. 92, head 13—"property and civil rights".

Attorney-General for Canada v. *Attorney-General for Alberta* (8) is of the greatest importance in considering this reference; it was relied on by each of the majority judges below on, it is submitted, a misunderstanding of what it decided. There is no comparison between the statute in that case and the present one. It was a purely regulatory statute

(4) (1881) 7 App. Cas. 96, 107, 111.
(5) (1883) 9 App. Cas. 117, 130.
(6) [1896] A. C. 348-371.
(7) [1902] A. C. 73, 78.
(8) [1916] 1 A. C. 588.

which fell directly in line with the decision in which it was said that contracts cannot be regulated. Where there is a provision which merely regulates a particular trade it must be conceded that that is now decided against the appellant. But where there is a statute which simply prohibits completely a person doing a certain thing, then the position is not affected by that decision. The fundamental error in the court below here is that they said that a person is free to do this act of manufacturing and selling margarine, and therefore any legislation about it is in relation to "property and "civil rights". But every restriction which is placed on the liberty of the subject is not necessarily a matter which is within property and civil rights. This is a protective measure, and the prohibition against manufacture and sale is simply part and parcel of a single scheme; it is identical with the prohibition against importation and should be treated in the same way—as intra vires. This case does not fall within the rule laid down in *Toronto Corporation* v. *Virgo* (9). If this legislation stands it will be open to one province to prohibit the importation of produce from another: see the *Gold Seal* case (10); *Atlantic Smoke Shops Ld.* v. *Conlon* (11). Section 5 *(a)* does not fall within any of the above-cited decisions so as to invalidate it, and there is no justification for a further restriction on s. 91, head 2—for taking another slice out of "trade and commerce"—so as to invalidate it. Somewhere in ss. 91 and 92 there exists this power; it is not in the province, which is limited in s. 92, head 16, to matters of a local and private nature. Further, this statute establishes standards of quality for dairy products, and the regulation of standards of quality has been held to be within the regulation of trade and commerce.

1951 A.C. p. 183.

Particular authorities in support of the second proposition—that this is legislation in relation to the criminal law—are *Attorney-General for Ontario* v. *Hamilton Street Railway* (12), *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (13), and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (14). The question in relation to criminal law is whether this statute was a colourable device. A colourable statute is one which says one thing but obviously means something else. There is

(9) [1896] A. C. 88.
(10) 62 S. C. R. (Can.) 424.
(11) [1943] A. C. 550, 569.
(12) [1903] A. C. 524,
(13) [1931] A. C. 310, 324.
(14) [1937] A. C. 368.

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1951 A.C. p. 184.

no colourability here; there is nothing to indicate that Parliament did not genuinely believe in the prohibition; the onus is on those who assert to the contrary.

On the third proposition—that this is a law for the peace, order and good government of Canada in the sense that it is outside of s. 92—s. 5 *(a)* cannot be described as falling within the category of a matter of a merely local or private nature in the province. An example of what quite clearly is not such a matter is the Atomic Energy Control Act, 1946 (10 Geo. 6, c. 37). [Reference in this connexion was also made to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (15); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (16); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (17); *Attorney-General for Ontario* v. *Reciprocal Insurers* (18); *Toronto Electric Commrs.* v. *Snider* (19); *Rex* v. *Eastern Terminal Elevator Co.* (20); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (21); *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (22); *In re Insurance Act of Canada* (23); and *Reference re The Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935 (24), which was affirmed on appeal (25).] The type of legislation in the last-cited case was completely different from that now in question. In that legislation the purpose was to regulate transactions according to a system imposed by Parliament. Almost every statute enacted under s. 91 affects "civil rights in the province". Every criminal law does. Section 5 *(a)* of the present Act undoubtedly affects civil rights in the sense in which that expression has been used throughout the cases, but the submission is that notwithstanding that, it is in relation to one or two heads of s. 91. The question must always be, is it "in relation to" this matter. [Reference was also made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (26); *Attorney-General for Ontario* v. *Attorney-General for Canada* (27); *Reference re Alberta Statutes* (28); *Shannon* v. *Lower*

(15) [1896] A. C. 348.
(16) [1902] A. C. 73.
(17) [1924] A. C. 222.
(18) [1924] A. C. 328, 333 et seq.
(19) [1925] A. C. 396, 401, 409.
(20) [1925] S. C. R. (Can.) 434, 457.
(21) [1929] A. C. 260, 268.
(22) [1931] A. C. 310, 323.
(23) [1932] A. C. 41, 46.
(24) [1936] S. C. R. (Can.) 398, 403 et seq.
(25) [1937] A. C. 368, 377.
(26) [1937] A. C. 368, 375.
(27) [1937] A. C. 405, 415.
(28) [1938] S. C. R. (Can.) 100, 120.

Mainland Dairy Products Board (29); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (30); and *Attorney-General for Ontario* v. *Canada Temperance Federation* (31).]

Lastly, s. 5 *(a)* is legislation in relation to "agriculture" and therefore validly enacted under s. 95 of the British North America Act. "Agriculture" in the federal field is unrestricted by any context as to distribution of powers under ss. 91 and 92. If Parliament decides that a certain class of agriculture should be provided with a physical market, that would be a proper legislation in relation to agriculture; to secure a market for Canadian producers is a proper legislation in relation to agriculture.

R. H. Milliken, K.C. (Canadian Bar), for the appellant federation. [He reviewed the relevant passages from a number of the above-cited authorities and, in addition, and in support of the proposition that s. 5 *(a)* was validly enacted as legislation in relation to agriculture, referred to the following authorities:—*Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (32); *Rex* v. *Horning* (33); *Brooks* v. *Moore* (34); *Reference re the Validity of s. 6 of the Farm Security Act, 1944 (Saskatchewan)* (35).] In the case last cited it was said that there is obviously a difference between legislation "in relation to" agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. The Dairy Industry Act is a law in support of agriculture; it is guaranteeing to the producer of dairy produce that there will be a reasonable market for his produce in Canada. The marketing arrangements or organization for disposing of the farmer's produce is a proper part of "agriculture". 1951 A.C. p. 185.

L. Emery Beaulieu, K.C. (Canadian Bar), *MacKenna, K.C.* and *Le Quesne* for the respondent the Attorney-General for Quebec. Section 5 *(a)*, in so far as it prohibits the manufacture and sale or having in possession for sale any margarine or other butter substitutes, is legislation relating to "property and civil rights" and is therefore ultra vires the Dominion of Canada. It is now well settled that the expres-

(29) [1938] A. C. 708, 718.
(30) [1933] A. C. 168.
(31) [1946] A. C. 193, 203 et seq.
(32) [1949] A. C. 110, 122 et seq.
(33) (1904) 8 O. L. R. 215, 219-20.
(34) (1907) 13 B. C. L. R. 91, 94.
(35) [1947] S. C. R. (Can.) 394, 413.

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sion "property and civil rights" has been used in s. 92, head 13, in its widest sense: *Citizens' Insurance Company of Canada* v. *Parsons* (36); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (37). The words "civil rights" used in their widest sense or meaning include not the mere rights flowing from contract, including commercial contracts, but also what may be called the common-law right of any individual to engage in any profession or occupation of his choice, or to carry on any trade or business that he may select. If the provinces have powers as plenary as the Imperial Parliament within the limits of s. 92, then the legislatures have the power, when dealing with property and civil rights, not only to create new civil rights but also to regulate existing civil rights, or abridge or destroy them, or to prohibit the exercise of any civil right. If that is so, a law which prohibits the manufacture of any produce, including margarine, is prima facie a law relating to property and civil rights; it infringes on the rights of individuals to carry on a trade in the province. [Reference was made to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (38); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (39); and *Shannon* v. *Lower Mainland Dairy Products Board* (40).]

1951 A.C. p. 186.

It is not competent for the Federal Parliament under s. 91, head 2, to attempt to regulate a particular trade in one province or in all the provinces together. For the federation it was sought to draw a distinction between a law regulating a particular trade, which would be incompetent under the decisions, and legislation prohibiting a particular trade, and it was suggested that, although Parliament could not possibly regulate such a trade as the present one, it should at least be considered as competent to prohibit it. The decisions which were referred to do not decide purely and simply that Parliament is not competent to regulate a particular trade; they also give the reasons for it, and they are, implied or express, that trade and commerce by itself is a matter of property and civil rights, and that, unless for any reason it can be brought under s. 91, head 2, it falls under s. 92, head 13. If Parliament is incompetent to regulate, it

(36) 7 App. Cas. 96.
(37) [1892] A. C. 437, 442.
(38) [1896] A. C. 348, 361.
(39) [1902] A. C. 73, 77, 79.
(40) [1938] A. C. 708, 719.

cannot be said to be competent to prohibit, for that is a graver invasion of property and civil rights. [Reference was also made to the *Dominion Insurance* case (41); *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* (42); *Reference re the Natural Products Marketing Act, 1934, and its Amending Act, 1935* (43); and *Gold Seal Ld.* v. *Attorney-General for Alberta* (44).] This legislation cannot be supported on the ground that it is in relation to trade and commerce.

Secondly, this enactment is not in relation to "the criminal "law" under head 27 of s. 91. The appellant federation relied on a statement in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (45) which, it was submitted, was to the effect that any enactment in a prohibitory form with a penal section was criminal legislation. That statement of Lord Atkin in delivering the judgment of the Board must, however, be construed in relation to the context of the case and also in relation to later decisions of the Board in which Lord Atkin delivered the judgment. The provinces can attach penal sections to their laws. It is the substance of the law that must be looked at; it must be criminal legislation in truth and in substance: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (46); *Attorney-General for Canada* v. *Attorney-General for Ontario* (47); *Attorney-General for Ontario* v. *Reciprocal Insurers* (48). If this is in pith and substance really "civil rights" legislation, it cannot at the same time be in relation to the criminal law. In pith and substance "criminal law" under head 27 must be passed to suppress an evil affecting the body politic as a whole. In this case it cannot be legislation in relation to the criminal law to protect one class of citizen against the other. They are attempting to protect the production of butter by prohibiting the production of competitive substances—the farmer against the manufacturer of margarine; that is not legislation in relation to the criminal law.

1951 A.C. p. 187.

There are in question here only two heads of s. 91—heads 2 and 27—and then outside those there is the general residuary power under s. 91 to make laws for the peace, order and good

(41) [1916] A. C. 588, 595.
(42) [1922] 1 A. C. 191, 197.
(43) [1936] S. C. R. (Can.) 398, 410, 412; [1937] A. C. 377, 386.
(44) 62 S. C. R. (Can.) 424, 457.
(45) [1931] A. C. 310, 324.
(46) [1937] A. C. 368, 375.
(47) [1937] A. C. 355, 367.
(48) [1924] A. C. 328, 340, 347.

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government of Canada; but that power is subject to the powers assigned exclusively to the provinces under s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (49). To avail itself of the power to legislate under that general power the matter must be unquestionably of Canadian interest, and secondly, it must not encroach on any of the enumerated heads of s. 92. My whole argument on the "peace, order and good government" point is summarized in the observations of Duff, C.J., in the *Natural Products Marketing Act* case (50), which were approved by the Judicial Committee (51). Applying those observations to the present case, nobody is questioning the importance of the dairy industry, but assuming all the facts in the Order of Reference to be true, they do not constitute a sufficient reason to give to the dairy industry a character of national necessity which would distinguish it from the aggregate of local interests so as to bring it within the general residuary power.

Lastly, the legislation cannot be supported under s. 95 as being a law relating to agriculture. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (52) gives the real test to determine whether a law is relating to agriculture within the meaning of s. 95 or is purely and simply a law benefiting agriculture, which is not, according to that decision, a law relating to it. It must be a law interfering with, or relating to, the agricultural operation of the farm.

MacKenna, K.C., followed. Section 5 *(a)* concerns, inter alia, manufacture, and, so far as the section relates to that topic, it is not an exercise of power conferred to pass laws in relation to trade and commerce. There appears to be no case under the Canadian Constitution, or under the Australian Constitution where the same words appear, where it has been held that manufacture is included in the words "trade and commerce", a word which prima facie would not extend to trade and commerce. That is a real difficulty in the federation's way in so far as the section prohibits manufacture as distinct from sale. The proposition advanced for the federation that the Dominion has the power to prohibit all trade in any particular commodity is

1951 A.C. p. 188.

(49) [1896] A. C. 348, 359.
(50) [1936] S. C. R. (Can.) 398. 403-4, 419.
(51) [1937] A. C. 377.
(52) [1933] A. C. 168, 174.

unsound: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (53). Section 91, head 2, admittedly confers a power to regulate trade between Canada and foreign countries; that power can be exercised for the purpose of protecting industry, but because the Dominion may do that it does not follow that it has the power to protect industry by interference with purely provincial trade. With regard to the criminal law point, it is not right to say that a bare prohibition with a penalty attached is a good exercise of s. 91, head 27. There is not a single head in s. 92 which could not be made the subject of a bare prohibition by the Dominion legislature. Lastly, the Act in question in the *Natural Products Marketing Act* case (54) touches agriculture more nearly than a prohibition of the manufacture and sale of margarine. If it is not legislation in relation to agriculture to set up a marketing scheme in order that the farmer may get a good price for his product, it cannot be said that a law which forbids somebody from making margarine is a law in relation to agriculture.

S. A. Hayden, K.C., and *J. W. Blain* (both of the Canadian Bar) for the Hon. W. D. Euler. Examining s. 5 *(a)* independently, its effect is to remove a competing product from the butter market. The manufacture and sale of margarine in any province of Canada, but for this prohibition, would be within "property and civil rights" under head 13 of s. 92. There is nothing in the subject-matter, or in its effect, that would either give to s. 5 *(a)* a federal aspect that would cause it to be outside of s. 92 entirely, or any aspect in which s. 5 *(a)* may be considered so that it comes under some head of s. 91. It was said for the federation that s. 5 *(a)* could not be enacted under s. 92. The authorities show that the prohibitions in the provincial field under head 13 of s. 92 have been held to be a valid exercise of the authority under "property and civil rights". There are decisions of this Board in which prohibitions in a Federal Act have been held to be invalid as an encroachment on head 13 of s. 92, and not a valid exercise of power under s. 91, head 2.

If there is an evil affecting the whole of the body politic of Canada, and legislation to deal with it is passed by the Dominion Parliament which encroaches on "property and "civil rights", it would nevertheless be good. But here the

1951 [F] A.C. p. 189.

(53) [1896] A. C. 348, 363.

(54) [1937] A. C. 377.

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overriding object—to give a benefit to the butter industry—cannot be said to be of such national importance as to take it out of s. 92 and put it into s. 91: there is no overriding national problem in this connexion: *Attorney-General for Ontario* v. *Canada Temperance Federation* (55). To sum up on this point, first, the prohibition contained in s. 5 *(a)* cannot be supported under s. 91, head 2, having regard to the facts: and, secondly, the prohibition of trade, that is, of the manufacture and sale of a particular commodity, is part of the authority which the province enjoys under "property and civil rights" in the province.

With regard to the "criminal law" aspect, the underlying basis of criminal law is in the State's acting for the protection of, and in the interests of, the people as a whole; and that what is detrimental to those interests is that which should be the subject of criminal law. The field is, of course, a shifting one; but, where there is a regulatory statute including penal consequences for failure to comply, that is not of the character of criminal law in s. 91, head 27; the pith and substance of that legislation is something other than the prohibition of a criminal act in the public interest in the sense that it is detrimental to the public: *Attorney-General for Ontario* v. *Hamilton Street Railway* (56); the *Board of Commerce* case (57); the *Reciprocal Insurers* case (58); *Snider's* case (59); the *Proprietary Articles Trade Association* case (60); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (61).

Finally, on the question of s. 95, "in relation to" agriculture means directly and immediately related to or connected with agricultural operations. The pith and substance of the legislation must in each case be determined on its facts. [Reference was made to *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (62); the *Natural Products Marketing Act* case (63); the *Eastern Terminal Elevator* case (64); *Attorney-General for Canada* v *Attorney-General for British Columbia* (65); and *In re Insurance Act of Canada* (66).] Trade processes are here

(55) [1946] A. C. 193, 207.
(56) [1903] A. C. 524.
(57) [1922] 1 A. C. 191.
(58) [1924] A. C. 328.
(59) [1925] A. C. 396.
(60) [1931] A. C. 310.
(61) [1937] A. C. 368.
(62) [1933] A. C. 168, 174.
(63) [1937] A. C. 377.
(64) [1925] S. C. R. (Can.)434, 439.
(65) [1930] A. C. 111, 119-20.
(66) [1932] A. C. 41, 51.

applied to milk so as to convert it into a marketable commodity for the purposes of trade, and it is submitted that the connexion between the product that has resulted from those trade processes and agriculture is too indirect and remote to support a conclusion that legislation dealing with butter, for instance, or prohibiting the manufacture and sale of margarine, can be said to be "in relation to" agriculture within the meaning of s. 95.

F. P. Varcoe, K.C., in reply. This is a perfect case for the application of the pith-and-substance doctrine: *Union Colliery Company of British Columbia* v. *Bryden* (67); *Cunningham* v. *Tomey Homma* (68). Here the Dominion legislature was not endeavouring to regulate civil rights in the province, but was seeking to eliminate butter substitutes from Canadian commerce, and to protect the butter industry. This legislation falls under the regulation of trade and commerce because it establishes high butter and milk standards and eliminates cheaper substitutes. The *Hamilton Street Railway* case (69) seems to be the keystone of the criminal-law arch.

1951 A.C. p. 190.

October 16. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who, after stating the question referred, s. 5 *(a)* of the Dairy Industry Act, and the answer of the Supreme Court of Canada, continued: The argument in support of the appeal was presented by Mr. Varcoe, K.C., on behalf of the Attorney-General for Canada and by Mr. Milliken, K.C., on behalf of the appellant. They contended that the decision stated in para. 2 of the judgment of the Supreme Court should be reversed, but no question has been raised before their Lordships' Board, either by the appellants or by the respondents, as to the correctness of the decision stated in para. 1.

Counsel supporting the appeal contended that the prohibition of the manufacture, offer, sale, or possession for sale of the goods mentioned in s. 5 *(a)* (hereafter referred to as "the prohibition") was within the powers of Parliament, as defined in the British North America Act, 1867, for reasons which may be briefly summarized as follows: (1.) The prohibition is legislation in relation to the regulation of trade and commerce, and therefore falls within head 2 of s. 91 of

(67) [1899] A.C. 580. (68) [1903] A.C. 151, 157.
(69) [1903] A.C. 524.

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the British North America Act, 1867 (hereafter referred to as "the Act"); (2.) It is legislation relating to the criminal law and, therefore, falls within head 27 of the same section; (3.) It is a law for the peace, order and good government of Canada in relation to a matter not coming within any of the heads of s. 92 of the Act, and is within the "residuary power" conferred by the opening words of s. 91; (4.) It is a law "in relation to agriculture in all or any of the provinces" within s. 95 of the Act.

Each of those arguments raises questions of some difficulty, but they can be dealt with quite briefly, as their Lordships find themselves in agreement, on each point, with the conclusions of the majority of the Supreme Court. It is convenient first to give some account of the earlier history of the legislation which incorporates the prohibition. In 1886 the Parliament of Canada enacted "An Act to prohibit the "manufacture and sale of certain substitutes for butter", being chap. 42 of 49 Vict. This Act was in the following terms: "Whereas the use of certain substitutes for butter "heretofore manufactured and exposed for sale in Canada, is "injurious to health; and it is expedient to prohibit the "manufacture and sale thereof: Therefore Her Majesty, by "and with the advice and consent of the Senate and House of "Commons of Canada, enacts as follows:—1. No oleo- "margarine, butterine or other substitute for butter, manu- "factured from any animal substance other than milk, shall "be manufactured in Canada, or sold therein, and every "person who contravenes the provisions of this Act in any "manner whatsoever shall incur a penalty not exceeding "four hundred dollars and not less than two hundred dollars, "and in default of payment shall be liable to imprisonment "for a term not exceeding twelve months and not less than "three months".

It is to be noted that the "certain" substitutes for butter "heretofore" manufactured, the manufacture and sale of which are prohibited, are those manufactured from any animal substance other than milk. By this language margarine, as distinct from oleomargarine, is not affected as the former is manufactured exclusively from vegetable oils, while oleomargarine has in addition some animal fat.

Chapter 42 of 49 Vict. became c. 100 of R. S. C. 1886, but the preamble of the original Act was not continued and does

not reappear in any later legislation. Subsequently, by 3 Edw. VII, c. 6: "The Butter Act, 1903" was passed, s. 5 of which prohibits the manufacture, importation or sale of "any oleomargarine, butterine, or other substitute for butter, "manufactured wholly or in part from any fat other than "that of milk or cream". It is to be observed that importation, as well as manufacture and sale, became prohibited, and the prohibition is no longer limited to substitutes for butter manufactured from animal substances. Accordingly, margarine would appear to have become included in the prohibitions of this legislation.

In 1906, by c. 85 of the Revised Statutes of that year, the General Inspection Act (c. 99 of the Revised Statutes of 1886), the Grain Inspection Act, 1904 (4 Edw. VII, c. 15), and the Butter Act of 1903, became consolidated in the "Inspection and Sale Act", the provisions formerly constituting the Butter Act becoming Part VIII of the Act. Section 298 is in the same terms as s. 5 of the Act of 1903, the penalty section being s. 309. Part VIII of the last-mentioned Act was repealed by the "Dairy Industry Act, "1914". This Act was entitled an "Act to regulate the "manufacture or sale of butter substitutes". Section 5 *(a)* is in exactly the same terms as the prohibition now under consideration, margarine being for the first time expressly mentioned. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as c. 45 thereof.

1951 A.C. p. 192.

It is to be noted that by Order in Council, P.C. 3044, dated October 23, 1917, made under the War Measures Act, the operation of s. 5 *(a)* of the Dairy Industry Act was suspended, and by c. 24 of the Statutes of Canada, 1919 (2nd Session), provision was made for the manufacture and importation of oleomargarine until August 31, 1920, and sale thereof until March 1, 1921. By annual amendments the permissions contained in the Oleomargarine Act were extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale. During the period December 1, 1917, to September 30, 1923, oleomargarine was manufactured in Canada and imported into Canada on a very large scale.

The summary of legislation just set out shows that the prohibition has been part of the law of Canada for a considerable time, and apparently its validity has never been

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called in question before the present proceedings. This historical fact does not, however, relieve their Lordships of the task of considering whether the prohibition is or is not within the powers of Parliament as laid down in the Act. To quote the judgment of the Board in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (70), "Their Lordships entertain no doubt that time alone will "not validate an Act which when challenged is found to "be ultra vires". One other point emerges from the summary. It might have been contended at one time, in reliance on the preamble to the Act of 1886, that the purpose of the prohibition was to exclude from the Dominion substances which were injurious to health; but no such argument is possible today, having regard to the later legislation, in particular the repeal of the earlier legislation by the Dairy Industry Act, 1914, and to the measures taken in 1917 and subsequent years. It cannot be doubted that the object of the prohibition, as it appears in the Dairy Industry Act now in force, is the protection and encouragement of the Dairy industry.

The Dairy Industry Act is very fully analysed in the judgment of the Chief Justice. Their Lordships gratefully accept his analysis, without repeating it, and proceed to the consideration of the first argument of counsel supporting the appeal, that the prohibition is legislation in relation to the regulation of trade and commerce. In considering this argument their Lordships are faced yet again with the difficult task of choosing between the conflicting claims of the Dominion legislature, based on s. 91, head 2, of the Act and of the Provincial legislatures, based on s. 92, head 13. On the one hand, it is said that an enactment which seeks to encourage an important industry in the Dominion by prohibiting all citizens of the Dominion from embarking upon another competing industry can accurately be described as an enactment for the regulation of trade and commerce. On the other hand, it is said that the prohibition covers the manufacture and sale of the goods in question within, for instance, the Province of Quebec, and that the right of a citizen of that province to engage in such manufacture and sale is an important civil right in the province and comes

1951 A.C. p. 193.

(70) [1931] A. C. 310, 317.

directly within head 13 of s. 92; it is thus one of the classes of subjects assigned by the Act exclusively to the legislatures of the provinces.

If these conflicting claims had never before been considered by the Board their Lordships would be faced with a task of great difficulty, but similar conflicts, on different sets of facts, have been resolved over and over again in past years. Their Lordships think that a decision in favour of the validity of this prohibition would be contrary to the current of authority and, in particular, to certain recent decisions of the Board. They find it unnecessary to pass in review the decisions before the year 1936 which bear on this point. These decisions are summarized with clarity and accuracy in the masterly judgment of Duff, C.J., in the *Natural Products Marketing* case (71). The decision of the Supreme Court in that case was upheld and the judgment of Duff, C.J., was approved by the Board (72), and their Lordships regard the *Natural Products Marketing* case (72) as having a very important bearing on the present appeal. The Act then under consideration provided for the establishment of a Dominion Marketing Board whose powers included powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, and to determine the manner of the distribution, and the quantity, quality, grade or class of the product that should be marketed by any person at any time.

Lord Atkin, in giving the judgment of the Board, said (73): "There can be no doubt that the provisions of the Act cover "transactions in any natural product which are completed "within the province, and have no connexion with inter-"provincial or export trade. It is therefore plain that the "Act purports to affect property and civil rights in the "province, and if not brought within one of the enumerated "classes of subjects in s. 91 must be beyond the competence "of the Dominion legislature. It was sought to bring the "Act within the class (2) of s. 91—namely, The Regulation "of Trade and Commerce. Emphasis was laid upon those "parts of the Act which deal with inter-provincial and export "trade. But the regulation of trade and commerce does

1951 A.C. p. 194.

(71) [1936] S. C. R. (Can.) 398, (72) [1937] A. C. 377.
(73) Ibid. 386-7 (A.C.).

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"not permit the regulation of individual forms of trade or "commerce confined to the province. In his judgment the "Chief Justice says (74): 'The enactments in question, " 'therefore, in no far as they relate to matters which are " 'in substance local and provincial are beyond the juris- " 'diction of Parliament. Parliament cannot acquire " 'jurisdiction to deal in the sweeping way in which these " 'enactments operate with such local and provincial matters " 'by legislating at the same time respecting external and " 'inter-provincial trade and committing the regulation of " 'external and inter-provincial trade and the regulation " 'of trade which is exclusively local and of traders and " 'producers engaged in trade which is exclusively local to " 'the same authority: *The King* v. *Eastern Terminal* " '*Elevator Co.* (75).' Their Lordships agree with this and "find it unnecessary to add anything".

As appears from this passage, the regulation of trade and commerce which is assigned to the Dominion legislature by head 2 of s. 91 does not permit the regulation of individual forms of trade and commerce confined to the province. If such regulation is not permitted, it seems to their Lordships that, a fortiori, the prohibition of individual forms of trade and commerce confined to the province is not permitted. By the prohibition now in question, every citizen of (e.g.) the Province of Quebec is prohibited from manufacturing and selling certain named substances, even if he manufactures only in that province and sells only in that province. It is true that the prohibition applies equally to inter-provincial transactions, but the passage from Duff, C.J.'s judgment, set out and approved by the Board in the *Natural Products Marketing* case (73), seems fatal to any argument based on this fact. So also do the observations of Lord Haldane when delivering the judgment of the Board in the *Dominion Insurance* case (76): "It will be observed that s. 4 "deprives private individuals of their liberty to carry on the "business of insurance, even when that business is confined "within the limits of a province. It will also be observed "that even a provincial company operating within the limits "of the province where it has been incorporated cannot, "notwithstanding that it may obtain permission from the "authorities of another province, operate within that other

(74) [1936] S. C. R. (Can.) 412. (75) [1925] S. C. R. (Can.) 434.
(76) [1916] 1 A. C. 588, 595.

"province without the licence of the Dominion Minister . . . ". . . Such an interference with its status appears to "their Lordships to interfere with its civil rights within the "province of incorporation, as well as with the power of the "legislature of every other province to confer civil rights "upon it. Private individuals are likewise deprived of civil "rights within their provinces".

The truth is that the present case is typical of the many cases in which the Board has felt bound to put some limit on the scope of the wide words used in head 2 of s. 91 "in "order to preserve from serious curtailment, if not from "virtual extinction, the degree of autonomy which, as "appears from the scheme of the Act as a whole, the pro-"vinces were intended to possess"—see per Duff, J., in *Lawson* v. *Interior Tree Fruit & Vegetable Committee of Direction* (77). The necessity for putting such a limit leads to the rejection of counsel's first argument.

1951 A.C. p. 195.

In putting forward their second argument, counsel relied strongly on *Attorney-General for Ontario* v. *Hamilton Street Railway* (78), *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (79), and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (the Criminal Code case) (80). They pointed out that s. 10 of the Dairy Industry Act makes any violation of any provision of ss. 5 to 7 an offence, punishable on summary conviction with the penalties set out in s. 10; and that, apart altogether from s. 10, any breach of the prohibition in s. 5 *(a)* would be punishable under s. 164 of the Criminal Code. They submitted that in these circumstances s. 5 *(a)* was such a law as is described in head 27 of s. 91 of the Act.

Their Lordships are unable to accept this submission. It is necessary in each case to consider what is the "pith and "substance" of the legislation in question, and this was recognized by the Board in the *Criminal Code* case (81). In the present case, the prohibition in s. 5 *(a)* is in pith and substance a law for the protection and encouragement of the dairy industry in Canada. Incidentally, penalties are provided for any breach of the prohibition, but their Lordships are quite unable to regard this fact as sufficient

(77) [1931] S. C. R. (Can.) 357, 366.
(78) [1903] A. C. 524.
(79) [1931] A. C. 310.
(80) [1937] A. C. 368.
(81) Ibid. 376 (A.C.).

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per se to make the prohibition a law "for the peace, order, "and good government of Canada in relation to . . . "the criminal law, except the constitution of courts of "criminal jurisdiction, but including the procedure in crim- "inal matters" within the meaning of head 27 of s. 91. The contrary view would enable the Parliament of Canada to "assume exclusive control over the exercise of any class of "civil rights within the provinces, in respect of which "exclusive jurisdiction is given to the provinces under s. 92, "by the device of declaring those persons to be guilty of a "criminal offence who in the exercise of such rights do not "observe the conditions imposed by the Dominion". See *Attorney-General for Ontario* v. *Reciprocal Insurers* (82).

1951 A.C. p. 196.

Their Lordships views on this branch of the case may be happily stated by a quotation from the judgments of the majority in the Supreme Court. Rand, J., said (83): "That "object [i.e., the object of prohibition], as I must find it, is "economic and the legislative purpose, to give trade protec- "tion to the dairy industry in the production and sale of "butter; to benefit one group of persons as against com- "petitors in business in which, in the absence of the legisla- "tion, the latter would be free to engage in the provinces. "To forbid manufacture and sale for such an end is prima "facie to deal directly with the civil rights of individuals "in relation to particular trade within the provinces: "*Shannon* v. *Lower Mainland Dairy Board* (84). The "public interest in this regulation lies obviously in the trade "effects: it is annexed to the legislative subject-matter and "follows the latter in its allocation to the one or other "legislature. But to use it as a support for the legislation in "the aspect of criminal law would mean that the Dominion "under its authority in that field, by forbidding the manu- "facture or sale of particular products, could, in what it "considered a sound trade policy, not only interdict a "substantial part of the economic life of one section of "Canada, but do so for the benefit of that of another. "Whatever the scope of the regulation of inter-provincial "trade, it is hard to conceive a more insidious form of "encroachment on a complementary jurisdiction. This con- "clusion is not in conflict with *Attorney-General for British "Columbia* v. *Attorney-General for Canada* (85). (Section

(82) [1924] A. C. 328, 340.
(83) [1949] S. C. R. (Can.) 50.
(84) [1938] A. C. 708.
(85) [1937] A. C. 368.

"498A of the Criminal Code.) There, the essential nature of "the legislation was not the equalization of civil rights "between competitors or promoting the interest of one "trade as against another; it was the safe-guarding of the "public against the evil consequences of certain fetters "upon free and equal competition. There is no like purpose "here; there is nothing of a general or injurious nature to be "abolished or removed: it is a matter of preferring certain "local trade to others".

With these observations their Lordships entirely agree, and they are fatal to counsel's second argument in support of the appeal. That argument would have had more weight if it had been possible to contend that the object of the prohibition was to exclude from Canada substances injurious to health.

1951 A.C. p. 197.

In support of their third argument, counsel relied principally on *Russell* v. *Reg.* (86), and the recent case of *Attorney-General for Ontario* v. *Canada Temperance Federation* (87), in which *Russell's* case (86), not for the first time, was considered and commented upon. In the latter case Viscount Simon, in delivering the judgment of the Board, said (88): "In their Lordships' opinion, the true test must be found in "the real subject-matter of the legislation: if it is such that "it goes beyond local or provincial concern or interests and "must from its inherent nature be the concern of the "Dominion as a whole (as, for example, in the *Aeronautics* case (89) and the *Radio* case (90)), then it will fall within "the competence of the Dominion Parliament as a matter "affecting the peace, order and good government of Canada, "though it may in another aspect touch on matters specially "reserved to the provincial legislatures. War and pestilence, "no doubt, are instances: so, too, may be the drink or drug "traffic, or the carrying of arms. In *Russell* v. *Reg.* (86), "Sir Montague Smith gave as an instance of valid Dominion "legislation a law which prohibited or restricted the sale or "exposure of cattle having a contagious disease. Nor is "the validity of the legislation, when due to its inherent

(86) 7 App. Cas. 829.
(87) [1946] A. C. 193.
(88) Ibid. 205 (A.C.).
(89) [1932] A. C. 54.
(90) [1932] A. C. 304.

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"nature, affected because there may still be room for enact-
"ments by a provincial legislature dealing with an aspect of
"the same subject in so far as it specially affects that
"province".

This passage must, however, be considered with the words used by Lord Atkin when delivering the judgment of the Board in the *Labour Conventions* case (91): "But the validity
"of the legislation under the general words of s. 91 was sought
"to be established not in relation to the treaty-making
"power alone, but also as being concerned with matters of
"such general importance as to have attained 'such dimen-
" 'sions as to affect the body politic', and to have 'ceased to
" 'be merely local or provincial', and to have 'become matter
" 'of national concern'. It is interesting to notice how often
"the words used by Lord Watson in *Attorney-General for*
"*Ontario* v. *Attorney-General for the Dominion* (92) have
"unsuccessfully been used in attempts to support encroach-
"ments on the provincial legislative powers given by s. 92.
"They laid down no principle of constitutional law, and
"were cautious words intended to safeguard possible
"eventualities which no one at the time had any interest
1951 A.C. p. 198. "or desire to define. The law of Canada on this branch
"of constitutional law has been stated with such force and
"clarity by the Chief Justice in his judgment in the reference
"concerning the Natural Products Marketing Act (93)
"dealing with the six Acts there referred to, that their
"Lordships abstain from stating it afresh. The Chief
"Justice, naturally from his point of view, excepted legisla-
"tion to fulfill treaties. On this their Lordships have ex-
"pressed their opinion. But subject to this, they agree with
"and adopt what was there said. They consider that the
"law is finally settled by the current of cases cited by the
"Chief Justice on the principles declared by him. It is only
"necessary to call attention to the phrases in the various
"cases, 'abnormal circumstances', 'exceptional conditions',
" 'standard of necessity' *(Board of Commerce* case (94)),
" 'some extraordinary peril to the national life of Canada',
" 'highly exceptional', 'epidemic of pestilence' *(Snider's* case
"(95)), to show how far the present case is from the condi-

(91) [1937] A. C. 326, 352-3.
(92) [1896] A. C. 348.
(93) [1936] S. C. R. (Can.) 398, 414 et seq.
(94) [1922] 1 A. C. 191.
(95) [1925] A. C. 396.

"tions which may override the normal distribution of powers "in ss. 91 and 92. The few pages of the Chief Justice's "judgment will, it is to be hoped, form the locus classicus of "the law on this point, and preclude further disputes".

Their Lordships think it sufficient to say, in answer to this third argument, that the prohibition now under consideration relates to civil rights within each of the provinces and that neither the facts set out in the Order of Reference, nor any other facts of which their Lordships could take judicial notice, lead to the conclusion that there exist in the present case the conditions which may override the normal distribution of powers in ss. 91 and 92.

As to counsel's fourth and last argument, their Lordships have already recognized that the object of the prohibition was to protect and encourage the dairy industry in Canada. For this reason, counsel contend that it is a law in relation to agriculture within s. 95 of the Act, although in form it is merely a prohibition relating to certain manufactured substances. In their Lordships' view, however, the authorities show that this contention is unsound. In *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (96) the Board had to consider the validity of the Dairy Products Sales Adjustment Act, 1929, which authorized the appointment of an Adjustment Committee in any district in which the dairy farmers petitioned for one. The object of the Act was to relieve congestion in the fluid milk market caused by a shortage of demand, and, as Lord Thankerton put it in delivering the judgment of the Board (97): "Broadly "stated, this object is attained by the Committee fixing "monthly the standard prices for fluid milk and manufac-"tured products respectively and the weight and quantity of "each sold or disposed of by all the farmers in the district, "based on returns compulsorily obtained from them, and "thereafter apportioning the difference between the total "value of the sales of each calculated at the respective stand-"ard prices, over the whole body of farmers, in proportion "to the weight of fluid milk sold or disposed of by each "farmer. Each farmer is then bound to contribute his share "of the apportionment to the Committee, who apportion "and pay the total amount so received to the farmers who "have sold or disposed of the manufactured products".

1951 A.C. p. 199.

(96) [1933] A. C. 168.

(97) Ibid. 173 (A.C.).

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Lord Thankerton also said (98): "The contention of the "appellants that the Act of 1929 is a law relating to agri- "culture under s. 95 of the Act of 1867 may be disposed of "as untenable, for the Act of 1929 does not appear in any "way to interfere with the agricultural operations of the "farmers, and s. 21 of the Act expressly prohibits the Com- "mittee from fixing prices at which milk or manufactured "products may be sold, and from directing in what quantity, "to whom, or when milk or manufactured products may be "sold or disposed of by a dairy farmer".

This passage bears strongly against the argument for the appellant federation, for it might well be thought that the Act which the Board was then considering could more easily be described as an Act in relation to agriculture than can the prohibition now under consideration.

It is significant that in the *Natural Products Marketing* case, already cited (99), it was not even argued that the Act in question, The Natural Products Marketing Act, 1934, came within s. 95 of the Act. No mention appears to have been made of s. 95 of the Act, either before the Board or in the Supreme Court of Canada. In their Lordships' view the Act of 1934 was more closely related to agriculture than the prohibition now under consideration; it may be that counsel considered an argument based on s. 95 to be hopeless, in view of the observation of Lord Thankerton already quoted.

If, however, there were any doubt as to the principles to be applied in construing s. 95, it is removed, in their Lordships' view, by a passage in the judgment of the Board, delivered by Viscount Simon, in *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (100). The Act then under consideration was the Farm Security Act, 1944, of Saskatchewan, and the main object of that Act was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of there being in any year a crop failure as defined in the Act. A portion of the Act relating to a reduction of interest was attacked as being ultra vires the provincial legislature, and the portion attacked was sought to be upheld on the ground that its pith and substance was "agriculture in the province" within

1951 A.C. p. 200.

(98) Ibid. 74 (A.C.). (99) [1937] A. C. 377.
(100) [1949] A. C. 110.

the meaning of s. 95 of the Act, and that it was not repugnant to any Act of the Parliament of Canada. In dealing with this contention, which had been supported by the dissenting judgment of Taschereau, J., in the Supreme Court, Viscount Simon said (101): "It is convenient to deal first with this "last contention, which provided a chief ground on which "the dissenting judgment of Taschereau, J., was based. "There was abundant evidence that agriculture is the main "industry of Saskatchewan and that it is the principal "source of revenue of its inhabitants. It is moreover clear "that the result of the impeached legislation, if it is validly "enacted, would be to relieve in some degree a certain class "of farmers from financial difficulties due to the uncertain- "ties of their farming operations. But, as Rand, J., points "out, there is a distinction between legislation 'in relation to' "agriculture and legislation which may produce a favourable "effect on the strength and stability of that industry. "Consequential effects are not the same thing as legislative "subject-matter. It is 'the true nature and character of the "'legislation'—not its ultimate economic results—that "matters (*Russell* v. *Reg.* (102)). Here, what is sought to "be statutorily modified is a contract between two parties "one of which is an agriculturist but the other of which is "a lender of money. However broadly the phrase 'agri- "'culture in the province' may be construed, and whatever "advantages to farmers the re-shaping of their mortgages or "agreements for sale might confer, their Lordships are "unable to take the view that this legislation can be "regarded as valid on the ground that it is enacted in relation "to agriculture".

Although the prohibition now under consideration relates to a different subject-matter, the passage just quoted would seem to apply with much force to the present case. The prohibition might well "produce a favourable effect on the "strength and stability" of the dairy industry; but the passage just quoted shows that this fact alone is not sufficient to make it legislation "in relation to agriculture" within s. 95; and there is no other ground on which it can be brought within s. 95. To sum up, the connexion between the prohibition and the operations carried on by farmers is

(101) Ibid. 122-3 (A.C.).
(102) 7 App. Cas. 829, 840.

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1951 A.C. p. 201.

too indirect and remote to bring the prohibition within the terms of s. 95, and for this reason counsel's fourth and last argument fails.

Their Lordships are of opinion that the Supreme Court of Canada rightly answered that "the prohibition of manu-"facture, offer, sale, or possession for sale of the goods "mentioned is ultra vires of Parliament". This was the only question raised in this appeal and their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Charles Russell & Co.; Blake & Redden; Lawrence Jones & Co.; Slaughter & May.*

BENNETT & WHITE (CALGARY) LTD. v. MUNICIPAL DISTRICT OF SUGAR CITY (No. 5)

1951
4 D.L.R.
p. 129.

Judicial Committee of the Privy Council, Lords Simonds, Normand, Reid, Radcliffe and Asquith of Bishopstone. July 23, 1951.

Taxes I C, III E, I A—Constitutional Law III A—Incidence of taxation—Assessment Act, ss. 26(1)(l), 5(1)(o)(z)—Municipal District Act, s. 288—Whether tax on persons or property—Property owned by Crown—Interpretation against conflict with B.N.A. Act—Interests in Crown personal property not taxed—

Contracts II A—Sale of Goods IV—Passing of property by contract other than sale—Construction contract—Contract to "become and be" property of another together with delivery of possession—

Appellants contracted to build a dam for the Government of Canada, the agreement providing that all machinery, plant, equipment and materials of every sort should "become and be" the property of His Majesty for the purposes of the construction work and might not be removed without the consent of the Crown until the work was completed, at which time all unused plant and materials should be deliverable to appellants. It was also provided that the Crown should be in no way liable for loss or damage to such property; and that property rented and used by the appellant should, in the event of its default, be the property of the Crown for completion of the works with the further power of selling or otherwise disposing of them. Appellant appealed against municipal assessment in respect of the ownership of this personal property on the ground that it belonged to the Crown and was non-assessable.

Held, the agreement did not amount to a sale. Yet, the provision that the property should "become and be" the property of the Crown plus delivery of the property to a site owned and occupied by the Crown was sufficient to render the Crown the owner of the property.

The *Assessment Act*, R.S.A. 1942, c. 157, read together with the *Municipal District Act*, R.S.A. 1942, c. 151, imposes tax on the "owner" and the "person in possession". While delivery to the Crown vested ownership in the Crown there was then a notional or actual bailment or redelivery of possession to appellants for the purpose of carrying out the contract. The property, being owned by the Crown, could not be taxed. The person with an interest in such property may be taxed with respect to that interest if the words of the statute are sufficiently express. The Alberta statute merely provides that the person in possession shall be liable to pay the tax where in legal possession. There being doubt as to whether "person in legal possession" covers a person in possession of Crown property it should be construed so as not to conflict with s. 125 of the *B.N.A. Act* and be read to mean persons who are taxable as owners in possession. Moreover, this view is confirmed by the provision that the person to be assessed is the person "in legal possession of assessable personal property". And Crown property, being not taxable, is also not assessable. Appellants were therefore not subject to personal taxation measured with respect to the value of property owned by the Crown.

Cases Judicially Noted: *Re Keen & Keen*, [1902] 1 K.B. 555, distd; *Reeves* v. *Barlow*, 12 Q.B.D. 436; *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. 690, apld; *Halifax v. Fairbanks*, [1927], 4 D.L.R. 945, 3 W.W.R. 493, [1928] A.C. 117; *Vancouver* v. *A.-G. Can.*, [1944], 1 D.L.R. 497, S.C.R. 23, expld; *Smith* v. *Vermilion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108; *Montreal* v. *A.-G. Can.*, 70 D.L.R. 248, [1923] A.C. 136, distd.

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Taxes III D, I D—Administrative Law—Courts I C—Statutes II B—Jurisdiction of Courts in municipal assessment appeals—Removal only by clear and unambiguous statutory language—Assessment Act, ss. 32, 33, 45, 53—Judicial review on the merits—

A taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary Courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right. Under the *Assessment Act*, R.S.A. 1942, c. 157, there is a right of appeal to a Court of Revision and thence to the Alberta Assessment Commission. Ordinarily a person assessed may appeal to the Courts before or after his appeal to either of these bodies. An assessment before or after appeal to the Court of Revision is not precluded by ss. 32, 33, or 45 of that Act since the incontestability of an assessment under these sections is declared only "where any person was at the time of the assessment taxable in respect of any property". Section 53 of the Act, which confers jurisdiction on the Alberta Assessment Commission to decide the propriety of any assessment of persons or property, does not clearly make that jurisdiction exclusive and the jurisdiction of the Courts, not being ousted by clear language, continues.

Cases Judicially Noted: *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809; *Victoria* v. *Bishop of Vancouver Island*, 59 D.L.R. 399, [1921], 2 A.C. 384, 3 W.W.R. 214; *Donohue Bros.* v. *St. Etienne de la Malbaie*, [1924], 4 D.L.R. 361, S.C.R. 511, consd; *Hagersville* v. *Hambleton*, [1927] 4 D.L.R. 1044, 61 O.L.R. 327, disaprvd; *Sifton* v. *Toronto*, [1929], 3 D.L.R. 852, S.C.R. 484; *Ottawa* v. *Wilson*, [1933], 1 D.L.R. 273, O.R. 21, aprvd.

Taxes III D—Appeal VIII B—Judgments & Orders I G—Appeal from tax assessment—Whether assessment to be quashed or amended—Itemized and total assessments distinguished—

Where an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is wholly bad.

Cases Judicially Noted: *Montreal L. H. & P. Co.* v. *Westmount*, [1926], 3 D.L.R. 466, S.C.R. 515, folld.

Statutes Considered: *Assessment Act*, R.S.A. 1942, c. 157, ss. 5(1) (*o*), (*z*), 26(1) (*l*), 32, 33, 45, 53; *Municipal District Act*, R.S.A. 1942, c. 151, s. 288; *B.N.A. Act*, s. 125.

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APPEAL from a judgment of the Supreme Court of Canada, [1950] 3 D.L.R. 81, reversing a decision of the Alberta Supreme Court, Appellate Division, [1949] 2 W.W.R. 129, affirming a judgment of Shepherd J., *loc. cit.*, allowing appellants' appeal against municipal taxation in respect of personal property. Reversed.

R. H. Barron, for appellants.

A. G. Virtue, K.C. and *J. G. Le Quesne*, for respondent.

The judgment of their Lordships was delivered by

Lord Reid:—This is an appeal against a judgment of the Supreme Court of Canada dated March 30, 1950 [[1950], 3 D.L.R. 81, S.C.R. 450]. By that judgment the Supreme Court reversed a judgment of the Appellate Division of the Supreme Court of Alberta dated June 28, 1949, which had affirmed a judgment of Shepherd J. of April 21, 1949.

The appellants are a company incorporated under the *Companies Act* of the Province of Alberta, and the respondents are a municipal district in that Province. By the judgment of the Supreme Court of Alberta it was declared that the assessment of the appellants for personal property made by the respondents for the year 1947 was invalid, and that assessment was quashed and set aside.

In 1946 the Dominion Government were carrying out in the southern part of the Province of Alberta a large irrigation scheme which included the construction of diversion and irrigation tunnels at St. Mary Dam in the respondents' municipal district. On July 22, 1946, the Minister of Agriculture for the Dominion, acting on behalf of the Crown, entered into a contract with the appellants for the construction of those tunnels. That contract is hereafter referred to as "the contract". The value of the work to be done by the appellants under the contract was in the region of $800,000 and the work was to be completed by April, 1948. It will be necessary later to examine closely certain of the provisions of the contract, but at this point it need only be stated that the appellants were bound to provide the plant and equipment necessary for carrying out the contract and that they did provide, at the site of the works, a large variety of plant and equipment which remained there during the year 1947.

The respondents are authorized by the *Assessment Act*, R.S.A. 1942, c. 157, and the *Municipal District Act*, R.S.A. 1942, c. 151, of the Province to make assessments and levy taxes in respect of personal property in their district, and in June, 1947, their assessor visited the site of the appellants' works and spent three days in making a detailed valuation of those parts of the plant and equipment brought there by the appellants which he thought were taxable under those Acts as personal property. The assessor's valuation

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of this property was $183,147. On September 22, 1947, the respondent sent to the appellants an assessment slip which was a notice that the appellants were assessed for the year 1947 in respect of $6,140 for buildings and improvements, and $177,007 for personal property, making in all the sum of $183,147. It is admitted by both parties that nothing turns in this case on the distinction between buildings and personal property and that the assessment can be regarded as if it were entirely an assessment in respect of personal property. The appellants lodged a complaint against this assessment and this complaint was dealt with by the council of the respondents' district sitting as a Court of Revision on October 31st. The Court of Revision increased the assessment by $1,000. The appellants then appealed against this decision to the Alberta Assessment Commission on the following, among other, grounds:

"1. The personal property which comprises $178,022 of the said assessment is the property of His Majesty in the right of the Dominion of Canada and therefore the appellants cannot be assessed with regard thereto.

"2. The said assessment contains a considerable number of motor vehicles which are exempt from taxation."

This appeal was heard by the Commission and, after written briefs had been submitted, the Commission, on January 13, 1948, gave their decision, in which it was stated:

"After due consideration of these briefs and the evidence submitted, the Commission is of the opinion that the property in question has been rightfully assessed to Bennett & White (Calgary) Limited. The Commission, however, feels that the assessments are excessive and should be reduced to amounts as follows:—

"Personal property.....	$119,980
"Buildings and Improvements.....	$4,470

and it is so ordered."

The respondents then demanded from the appellants a sum of $3,915.27 as tax and penalty in respect of the assessment as altered by the Alberta Assessment Committee, and in answer to this demand the appellants raised the present action against the respondents on April 15, 1948.

In order to understand the nature of the present action it is necessary to have in mind the scheme for the taxation

of personal property contained in the *Assessment Act* and the *Municipal District Act* (which are directed by s. 3 of the *Assessment Act* to be read together), and it is also necessary to have in mind certain provisions of the contract. 1951 4 D.L.R. p. 133.

As regards assessment, s. 4 of the *Assessment Act* provides that, subject to certain exceptions which are not material in this case—"All property and every interest therein in a municipality which is subject or liable to taxation by an Act of the Province, save and except only such property as is declared by this Act to be exempt, shall be liable to assessment and taxation by the municipality".

The exemptions are contained in s. 5 and those material in this case are—

"5(1)(*o*) Every right, title and interest of His Majesty in any property whatsoever; and

(*z*) All motor vehicles."

Section 8 provides—

"8(2) The board of a school district which collects its own taxes and the council of any municipality may provide by by-law passed not later than the first day of May in any year, that in the said year all personal property within the school district or municipality, as the case may be, shall be liable to assessment and taxation. In a municipality this assessment may be made for municipal purposes or for school purposes or for both.

"(3) In any school district or municipality in which personal property is liable to assessment and taxation, it shall be assessed at its actual cash value as it would be appraised if taken in payment of a just debt."

The respondents passed a by-law on April 3, 1947, to the effect that—"Under authority of section 8 of the Assessment Act, being chapter 157 of the revised Statutes of Alberta, 1942, and subject to the various provisions of the said Act, the Council of the Municipal District of Sugar City No. 5 enacts that within the boundaries of Sugar City No. 5 all personal property shall be liable to assessment and taxation for both municipal and school purposes".

Section 24 provides that the assessor of the municipality shall make a return to the secretary-treasurer of the assessments made by him, and s. 26 directs the secretary-treasurer

immediately to prepare an assessment roll in which he shall set forth as far as his then information permits—

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"26(1)(*l*) the name of the person who is the owner or of the person who is in legal possession of assessable personal property or the names of both such persons;

"(*m*) the assessed value of all assessable personal property."

Section 26(3) further provides that the secretary-treasurer shall include in the assessment roll the name and address of every person who is assessed in respect of such property and particulars of the property assessed and the assessed value thereof, but s. 26(4) states that failure to enter any of these particulars shall not invalidate the assessment nor affect the liability of any person to pay taxes if the correct description and the assessed value of the property appear upon the assessment roll. Section 27 directs the secretary-treasurer to mail to every person whose name appears on the roll an assessment slip.

If any person whose name appears on an assessment roll wishes to complain, s. 35 makes provision for his complaint being made to the Court of Revision and such complaint may be in respect of, *inter alia*,

"(35)(1)(*b*) any assessment alleged to be too high or too low;

"(*c*) any property or business in any way wrongfully assessed;

"(*d*) the name of any person alleged to be wrongfully entered upon or omitted from the assessment roll."

A further appeal from a decision of the Court of Revision is provided by s. 47, which enacts—

"47(1) Any person who, or the assessment of whose property is affected by the decision of the court of revision, or of the person or persons from time to time designated by the Minister as the person or persons to deal with complaints may appeal to the Alberta Assessment Commission against the decision and may also appeal against the omission, neglect or refusal of the court to hear or decide a complaint made to it, and in hearing all such appeals the Commission shall be governed by the provisions of this Act and *The Alberta Municipal Assessment Commission Act*."

The *Municipal District Act* makes provision in Part VII for the levying of taxes. Section 288 [re-enacted 1944, c. 41, s. 26] authorizes a levy for ordinary municipal purposes upon the assessed value of all lands, improvements and personal property set out in the assessment roll of a tax at a certain rate, and s. 291 [re-enacted 1944, c. 41, s. 28] directs the secretary-treasurer to enter in the assessment and tax roll a statement of all taxes against each parcel or personal property assessed upon the roll. Section 295 directs the secretary-treasurer to mail to each person whose name appears on the assessment roll notice of the amount of taxes due by him in respect of the property or business for which he is assessed, and s. 297 provides that all taxes levied under the provisions of this Act, except as otherwise provided, shall be deemed to be due on January 1st in the year in which they are imposed and shall be payable at the office of the secretary-treasurer.

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The provision in the contract on which the appellants chiefly rely in contending that the property assessed was the property of His Majesty is cl. 15, which is in these terms—"All machinery, tools, plant, materials, equipment, articles and things whatsoever provided by the contractor or by the engineer under the provisions of section 14 and 16 for the works and not rejected under the provisions of section 14 shall from the time of their being so provided become and until the final completion of the said work shall be the property of His Majesty for the purposes of the said works and the same shall on no account be taken away or used or disposed of except for the purposes of the said works without the consent in writing of the engineer. His Majesty shall not, however, be answerable for any loss or damage whatsoever which may at any time happen to such machinery, tools, plant, materials, equipment, articles or things. Upon the completion of the works and upon payment by the contractor of all such monies, loss, costs and damages, if any, as shall be due from the contractor to His Majesty or chargeable against the contractor under this contract such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract shall upon demand be delivered up to the contractor in such condition as they may then be in".

Relying on this clause the appellants, in their statement of claim, contended that they had been wrongfully and illegally assessed because the personal property in respect of which the assessment was made was at all relevant times the property of His Majesty and that they could not be in law assessed or placed on the tax roll in relation thereto. Alternatively, the appellants relied on the exception of motor vehicles in s. 5(1)(*z*) of the *Assessment Act* and contended that certain types of vehicles specified were motor vehicles within the meaning of this exception and were exempt from taxation.

The respondents in their defence and counterclaim contended that the decision of the Alberta Assessment Commission against the appellants was a final decision and that the appellants were precluded by it from taking exception to the assessment and taxation of which they complain. The respondents further sought a declaration that the appellants are liable to the said assessment and taxation.

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Shepherd J. decided that the appellants were not precluded from maintaining this action and that the appellants are entitled to succeed on the ground that the assessment for personal property made against them for the year 1947 is invalid. He therefore quashed and set aside this assessment. The Appellate Division of the Supreme Court of Alberta reached the same decision but on somewhat different grounds. The case was then appealed to the Supreme Court of Canada [[1950] 3 D.L.R. 81] where the decision of the Courts of Alberta was reversed and the appellants' action was dismissed. The decision of the Supreme Court of Canada was unanimous, but judgments of Kerwin J. and Rand J. were based on different reasons. The decision of Rand J. was concurred in by Taschereau, Estey and Locke JJ. Rand J. held that the appellants were not precluded by the decision of the Alberta Assessment Commission from maintaining this action but that they failed in this action because the property assessed was not the property of His Majesty but was throughout owned and possessed by the appellants. The majority, however, held that certain of the subjects assessed came within the statutory exception of motor vehicles and the course which they took to give effect to this finding gives rise to a difficulty which their Lordships will later examine. Kerwin J. was of opinion that the appellants were precluded from maintaining this

action on the ground that the decision of the Alberta Assessment Commission is *res judicata*. Their Lordships think it proper to deal with this matter first as it involves a question of jurisdiction.

Questions of a somewhat similar character have arisen not infrequently in the past and it may be well, before examining the statutory provisions which are relevant in this case, to consider the earlier cases. *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809, has for long been regarded as the leading authority. In that case under the *Assessment Act* of Ontario personal property of the company was exempt from assessment and the question was whether the company's tramway cars in Toronto were within this exception or were liable to taxation as real estate. The corporation assessed these cars. The *Assessment Act* provided for an appeal to a Court of Revision which was empowered to "try all complaints in regard to persons wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum". That Court decided against the company on their appeal. The Act provided for further appeals first to a board of County Court Judges and then to three or more Judges of the Court of Appeal; and it provided that the latter appeal should be final. The company appealed unsuccessfully to the board and then to the Court of Appeal. Then the corporation sought to tax the company on the value of the tramway cars. The company refused to pay and raised an action in which they claimed a declaration that the cars were personal estate and that they were not liable to pay the tax in respect of them which the corporation demanded. The corporation pleaded *inter alia* that the decision of the Court of Appeal was *res judicata*. Their Lordships held [p. 815] that the Court of Revision and the Courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was ab initio a nullity they had no jurisdiction to confirm it or give it validity". Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

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In *Victoria* v. *Bishop of Vancouver Island*, 59 D.L.R. 399, [1921] 2 A.C. 384, the land upon which St. Andrews Cathedral stands had been assessed for several years under the *Municipal Act* of British Columbia and the corporation

sought to recover from the Bishop taxes in respect of these years. The Act exempted every building set apart and in use for the public worship of God, and the question was whether the site of the Cathedral fell within this exemption. The corporation contended that it was too late to raise this question. The Act provided that every person complaining of an "error or omission in regard to himself" as having been wrongfully placed upon the assessment roll had a right of appeal to a Court of Revision and that the assessment roll as revised confirmed and passed by the Court of Revision except in so far as amended on appeal by one of the tribunals mentioned in the Act should be deemed valid and binding on all persons concerned. The Bishop had taken no objection to the assessment rolls for the years in question and they were duly passed and confirmed, but it was held by their Lordships that this did not prevent him from maintaining later that no taxes had been lawfully imposed on the land on the ground that the sections to which reference has been made "are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. To hold that they did so would amount to holding that the corporation and its officers had the power of repealing express provisions of these statutes". [p. 410]

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These cases were followed by the Supreme Court of Canada in *Donohue Bros.* v. *St. Etienne de la Malbaie*, [1924], 4 D.L.R. 361, S.C.R. 511. In that case Anglin J. said [p. 364]: "The inclusion of the non-assessable property is simply ineffectual. Such property, though included in the roll, cannot be made the subject of taxation". In *Donohue's* case the Supreme Court in their Lordship's judgment rightly distinguished the case of *Shannon Realties Ltd.* v. *St. Michel*, [1924], 1 D.L.R. 119, A.C. 185, 47 Que. K.B. 416. In the *Shannon* case the company sought to have the entire assessment roll for several years quashed and annulled. This claim failed, but it appears from a passage in the judgment of Duff J. [70 D.L.R. 773, 64 S.C.R. 420] which was approved by their Lordships that it was open to the company to question the roll in answer to a claim for taxes.

The case on which the respondents in this appeal chiefly relied was *Hagersville* v. *Hambleton*, [1927] 4 D.L.R. 1044, 61 O.L.R. 327, in which the decision of a Court of Revision was held to be *res judicata*. The Ontario *Assessment Act* had been amended after the decision in *Toronto R. Co.* v. *Toronto*, *supra*, so as to give to the Court of Revision jurisdiction to determine the amount of any assessment and also all questions as to whether any persons were assessable or had been legally assessed, and Middleton J.A. stated [p. 1047] that the Act as amended "gives to the assessment roll, as finally revised, a binding and conclusive effect as to all matters that were or might have been raised upon an appeal to the Court of Revision". Their Lordships are unable to agree with this as a general statement of the law. In the first place the *Hagersville* case was complicated by an admission that jurisdiction was legally and effectively vested in the Court of Revision, and it was held at least by some of the learned Judges that it followed from this that a decision of the Court of Revision was *res judicata*. Riddell J.A. [p. 1046] having stated the general rule that in order to oust the jurisdiction of the ordinary Courts it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court, said, "Here the plea has been properly made, the jurisdiction in the 'other Court', the Court of Revision, is admitted, and the matter must be held concluded". And secondly their Lordships are unable to reconcile the statement of the law by Middleton J.A. with later Ontario cases. In *Sifton* v. *Toronto*, [1929], 3 D.L.R. 852, S.C.R. 484, an assessment was made on a person who had ceased to reside in Toronto. The assessment was made by simply taking the previous year's assessments. The person aggrieved had resided in Toronto during that year and had then no reason to appeal. The next year he had no opportunity to appeal in the manner provided by the Act because of the procedure adopted in making the assessment: the only possible appeal was to the Court. That being so the Supreme Court distinguished the *Hagersville* case and held that appeal to the Court was competent. Their Lordships recognize that this is a possible distinction but they are unable to find any sufficient distinction between the *Hagersville* case and the next case decided in Ontario, *Ottawa* v. *Wilson*, [1933], 1 D.L.R. 273, O.R. 21. In that case the taxpayer had removed from the city before he was assessed, so the city had no right to assess him. He could

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have exercised the rights of appeal under the *Assessment Act* but he did not do so. Instead he raised the matter in Court and he was held entitled to do so. The only substantial difference between this case and the *Hagersville* case appears to be that in the *Hagersville* case the person aggrieved had appealed unsuccessfully to the Court of Revision before raising the matter in the ordinary Courts whereas in *Wilson's* case he had not. This could only be a valid distinction if the law were that a person aggrieved by an assessment has an option either to appeal in the manner provided by the Act or to raise the matter in the ordinary Courts. Their Lordships have seen nothing in the Act from which an intention to create such an unusual option could be inferred.

In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary Courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

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As has already been stated a person who objects to an assessment under the *Assessment Act* of the Province of Alberta is entitled under that Act to complain to a Court of Revision on any of the grounds set out in s. 35: those grounds include a complaint that any property has been wrongfully assessed or that the name of any person has been wrongfully entered upon the assessment roll. If dissatisfied with the decision of that Court he can, under s. 47, appeal against that decision to the Alberta Assessment Commission. So there are three stages at which a person might plead in an action in the ordinary Courts that he had been illegally assessed and was not bound to pay tax levied in consequence of that assessment. He might do so without having exercised his right to complain to the Court of Revision; or he might do so after having complained unsuccessfully to the Court of Revision but without having exercised his right to appeal to the Assessment Commission; or he might do so after having appealed unsuccessfully to the Assessment Commission. It is necessary to examine each of these possible cases in turn. The relevant provisions of the Act in the first case are ss. 32 and 45. Section 32 provides:

"Where any person was at the time of the assessment taxable in respect of any property, business, trade or profession, or in respect of any share or interest therein, in respect of which his name was entered upon the assessment roll, and there has been no complaint to the court of revision, in accordance with the provisions of this Act, then upon the expiration of the time hereinafter limited for the lodging of complaints, the assessment of the property, business, trade or profession or any share or interest therein entered opposite his name shall be deemed incontestably to be the proper, lawful and final assessment of the property, business, trade or profession or of his share or interest therein."

Section 45 provides: "Upon the termination of the sittings of the court of revision, or where there are no complaints upon the expiry of the time for complaining thereto, the secretary-treasurer shall, over his signature, enter at the foot of the last page of the roll, the following certificate, filling in the date of the entry: 'Roll finally completed this day of , 19 '; and the roll as thus finally completed and certified shall be the assessment roll for that year, subject to amendment on appeal to the Alberta Assessment Commission, and to any amendment that may be necessary to bring the roll into conformity with the assessment of the municipality made by the Commission, and any directions of the Commission with respect thereto, and subject to any further amendment as herein provided, and shall be valid and bind all parties concerned, notwithstanding any defect in or omission from the said roll or mistake made in or with regard to such roll or any defect, error or mis-statement in any assessment slip or notice or any omission to deliver or to transmit any assessment slip or notice."

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It is to be observed that the initial words of s. 32 "Where any person was at the time of the assessment taxable in respect of any property" govern the whole section. So, if a person was not taxable in respect of property entered against his name in the roll, this section does not purport to make that assessment incontestable or final. Section 45 only makes the roll final and binding notwithstanding defects, omissions or mistakes in it, and it is plainly only what their Lordships in *Victoria* v. *Bishop of Vancouver Island, supra*, referred to as a "machinery section". Accordingly there is nothing in the Act which could prevent a person who had

failed to complain to a Court of Revision from pleading after the roll had become final that he was not taxable in respect of the property entered against his name in the roll.

The position at the next stage is the same. The relevant sections are then ss. 33 and 45, and the provisions of s. 33 are the same as those of s. 32 *mutatis mutandis*. Section 33 also begins with the words "When any person was at the time of the assessment taxable". So an unsuccessful complaint to the Court of Revision does not prevent the person aggrieved from later raising in Court the question whether he is taxable, and the decision of the Court of Revision is not *res judicata*.

The respondents contend that the position is different if the person aggrieved appeals from the decision of a Court of Revision to the Alberta Assessment Commission before raising the matter in the ordinary Courts, and that a decision of the Assessment Commission dismissing such an appeal is *res judicata*. If that contention is right the effect is that a person aggrieved by a decision of a Court of Revision has an option either to take the matter to Court or to appeal to the Assessment Commission, so that if he appeals to the Assessment Commission and gets an adverse decision from them he cannot thereafter be heard to raise the same matter again in Court.

This contention is based entirely on s. 53 of the *Assessment Act* which is in these terms, "In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment".

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The argument is that jurisdiction has been conferred on the Commission to determine whether persons were legally assessed and no appeal from the Commission's decision has been provided, and that a decision of a tribunal which has jurisdiction to make that decision must be *res judicata*. But their Lordships are of opinion that s. 53 is not unambiguous. No doubt it could have the meaning for which the respondents contend: but it can also mean that the Commission has jurisdiction to determine the matters mentioned in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only

for that purpose. The Court of Revision must have jurisdiction to determine those matters for that purpose because the grounds on which the Act allows a complaint to be made to that Court may involve those matters, and the statutory function of the Commission is only to hear and determine appeals from Courts of Revision. There is no indication in s. 45 or elsewhere that an entry in the assessment roll which has been upheld by the Commission is in any different position from any other entry in the roll or is any less subject to challenge in the Courts. Some indication that the scope of s. 53 is not unlimited may also be got from the fact that it only confers jurisdiction to deal with questions of assessment and is silent as to questions of liability to taxation, whereas ss. 4 and 5 which are the leading sections in the Act deal with liability to and exemption from both assessment and taxation. Moreover their Lordships think it not irrelevant to note that originally, when appeals from Courts of Revision went to the District Judge and not to the Commission, the Act provided that the decision and judgment of the Judge should be final and conclusive in every case, but that after the Commission was set up to hear appeals that provision was repealed. The jurisdiction of the Courts to determine questions of liability to taxation can only be ousted by clear words and in their Lordships' judgment it is far from clear that s. 53 was intended to have that effect. Accordingly their Lordships agree with the majority of the learned Judges of the Supreme Court of Canada in holding that the decision of the Assessment Commission is not *res judicata* against the appellants. There being, then, no substance in the plea that the mere decision of the Assessment Commission is final and conclusive in favour of the assessment, their Lordships proceed to consider whether that assessment was, on its merits, valid or not.

First, it is necessary to determine whom, or what property, in the present case the relevant provincial legislation purports to assess to personal property tax. It may be convenient to recall at this point the relevant statutory provisions although some of them have already been indicated.

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These provisions are contained in the Alberta *Assessment Act*, c. 157 of the Revised Statutes of Alberta as amended: and in the Alberta *Municipal District Act*, c. 151 of the

Revised Statutes of the Province, also as amended. Statutes of this kind can, in the case of land, in which successive or concurrent "estates" can exist, assess the persons entitled to these limited interests in proportion to their respective value. When, however, personal property (which is defined in the *Assessment Act* as "goods and chattels") is involved, the law knows nothing of successive estates in such property, nor do the provincial statutes pretend to assess "limited interests" therein. Whoever is liable to pay the tax must pay it on the full cash value of the personal property assessed (see, for instance, s. 8(3) of the Alberta *Assessment Act*).

The person who is to be assessed and who is to pay is the person whose name is entered on the assessment roll under the provisions of s. 26 of the *Assessment Act;* and this person, in the case of personal property, is either the "owner" or the person who is "in legal possession" of the property, or both such persons (s. 26(1)(*l*)). While the section speaks of the "owner" or "a person in legal possession", the definitions section—s. 2—provides that "owner" in relation to property other than land means "the person who is in legal possession" thereof, and seemingly, here, no one else. (What effect this small discrepancy has, when the ownership of chattels is in X and the legal possession in Y, is obscure but of no practical importance in this case.) By s. 5 of the *Assessment Act* the following property is exempt from taxation:

"5(1)(*o*) every right, title and interest of His Majesty in any property whatsoever;

"(*z*) all motor vehicles."

By s. 125 of the *B.N.A. Act*, "No Lands or Property belonging to Canada or any Province shall be liable to Taxation".

The first inquiry must, as indicated earlier, be, whether the Alberta legislation (which has not been challenged on the ground that it is *ultra vires*) purports to make either the property in question in this case, or the appellants in respect of that property, assessable.

This involves the further inquiry, whether the appellants were, in 1947—

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(*a*) "owners" or

(*b*) persons "in legal possession"

of the chattels in question within s. 26(1)(*l*). Clearly, if they were neither—as, for instance, they would be if the Crown were both—the appellants are exempt.

(*a*) Their Lordships are of opinion that the Crown was at all material times the owner of the articles in question. Clause 15 of the contract provides:

"15. All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty. . . ."

The English decided cases have dealt not infrequently with clauses of this type. (See *cf. Brown* v. *Bateman* (1867), L.R. 2 C.P. 272; *Blake* v. *Izard* (1867), 16 W.R. 108; *Reeves* v. *Barlow* (1884), 12 Q.B.D. 436; *Re Keen & Keen*, [1902] 1 K.B. 555; Hudson on Building Contracts, 7th ed., pp. 396, 420; *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. 690.) In some of these cases a distinction has been drawn between clauses which provide that as and when plant or materials are brought to the site they shall be "considered" or "deemed" to become the property of the building owner; and, on the other hand, clauses which provide that they are to "be and become" his property. In the former case it has sometimes been held that the clause was ineffective to achieve its aim and that the property remained in the builder, at the mercy of his creditors and trustee in bankruptcy (see *cf. Re Keen & Keen*, [1902] 1 K.B. 555). When, as in *Reeves* v. *Barlow* 12 Q.B.D. 436, a decision of the Court of Appeal and perhaps the leading decision in the field, the formula is "be and become" or its equivalent, that case decides that the clause means what it says, operates according to its tenor, and effectively transfers the title. In *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. 690, Farwell J. (as he then was), seems to have thought it immaterial which formula was used: but on any view "be and become" is effective, and the same must hold good of "become and be"—the wording employed in this case. It is true that apart from the case of bargain and sale of goods (and sale of goods is not here in question) either a deed, or a delivery (actual or constructive), is necessary to transfer the title to chattels *inter vivos*. But in the present case

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there was delivery on a site owned and occupied by the building owner—the Crown—and on the English cases this has been held sufficient. (It has been assumed that the words "as and when provided" in cl. 15 mean "as and when delivered on the site": indeed they can hardly mean anything else.)

If this reasoning is well founded the plant, equipment and materials became the property of the Crown as and when so delivered.

But the provincial statute purports to make not only the owner but any persons in legal possession of the personal property assessable. Their Lordships will, for the time being, postpone consideration of the arguments (1) that this tax falls on "property" only and not on persons in respect of that property: (2) that by s. 125 of the *B.N.A. Act* "property belonging to the Crown is exempt from taxation"; and treat first, without recourse to these possible grounds of exemption, the question whether the Crown or the appellants were at the material time "in legal possession" of the relevant property. It is certainly arguable, though not in their Lordships' considered opinion more, that as and when the chattels were delivered on the Crown site, the Crown acquired and as from then retained not only dominion, but legal possession of them. The following arguments under this head deserve consideration:

(1) While it is true that the earlier part of cl. 15 makes no express provision that possession is to reside in either party, yet the latter part of the clause provides that the respondents —the Crown—must, when the contractual work has been completed, deliver up the property to the builders. This, it is argued, is unmeaning unless there has been in the first instance a delivery the other way round—by the builders to the Crown—and such a delivery would vest the legal possession in the Crown and divest the builders thereof at the material time.

(2) A rule has sometimes been propounded in English decisions that where the contract is silent or ambiguous as to what party is to have possession, there arises a presumption that possession "runs with" the ownership (see *per* Lord Esher M.R. in *Ramsay* v. *Margrett*, [1894] 2 Q.B. 18 at p. 25).

(3) There must be a term implied in this case that (notwithstanding the property has passed to the Crown) the builders shall be entitled to use and handle their plant and materials. Such an implication is, in the strictest sense, "necessary to the business efficacy of the contract"—a building contract—for without it the builders could not build; but, it is contended, it is wrong to imply more than is strictly necessary; and here the necessities of the case would be satisfied by the implication of a licence, without the further implication of legal possession.

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(4) It is further argued that the essence of legal possession is exclusive control and that this cannot have been intended to remain in the builders because of the very wide powers of control vested by cl. 11 of the contract in the Crown's engineer. These arguments have been most carefully considered. They commended themselves to the trial Judge. But although not lacking in formal plausibility, they seem to their Lordships, when weighed, deficient in substance and reality. Argument (4) for instance would seem to confuse control of operations with control of the physical instruments by which the operations are to be carried out. These may well be in different persons.

The true position, in their Lordships' view, is that while the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown, there was a notional or actual bailment or redelivery of possession to the builders for the purpose of carrying out the building contract.

If, therefore, no other considerations were involved than those considered so far, the appellants might be judged to have been validly assessed *qua* persons in legal possession.

There are, however, at least two other factors to be taken into account—

A. The first of these is based on the express exemption under s. 5(1)(*z*) of the *Assessment Act*, of "all motor vehicles". In the assessment were included certain articles the character of which *qua* "motor vehicles" within the meaning of this head of exemption is not challenged in these proceedings—*viz.*, three motor vehicles of a type called "dumptors". They were not an insignificant component of the total subject-matter of the assessment. The Assessment Commission reduced the assessed values standing in the assessment as it emerged from the Court of Revision;

but as their Lordships read the Commission's decision it merely scaled down the amount without excising or varying any items against which these amounts were tabled. The Supreme Court of Canada on the other hand dealt with this situation by deleting the three "dumptor" items as items and approving the reduced assessment subject to this deletion. Their order was—"AND this Court did further order and adjudge that the appellant is entitled to a declaration that the assessment and taxation of all the personal property in question in this action, except the dumptors were properly made and imposed."

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With great respect to the Supreme Court, their Lordships feel bound to express their view that the course adopted by that Court was not open to it. When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as *de minimis*) is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal L., H. & P. Co.* v. *Westmount*, [1926], 3 D.L.R. 466, S.C.R. 515, the Court (see especially *per* Anglin C.J.C.) in these conditions held, that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid *in toto*.

B. This would be a sufficient reason for allowing the appeal: but their Lordships think it desirable to deal with a second ground on which the assessment was impeached, having regard to the elaborate argument which was directed to it.

It has been noted that s. 125 of the *B.N.A. Act* provides that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation". A solution of the present problem tempting in its simplicity is to say that the chattels in question in this case belong to the Crown in right of the Dominion of Canada and cannot be the subject-matter of taxation, whoever may be in legal possession of them: that there is no subject-matter on which a provincial

taxing statute can operate. The appellants hesitated to put their case as high as this: feeling that it would be difficult to reconcile such a submission with a number of decided cases including some decisions of this Board, where the subject was taxed although the ownership was in the Crown. Much argument was directed to the question whether the present tax or assessment was of "property", or of "persons in respect of that property": the first alternative favouring this extreme contention open to the appellants. On this point the following considerations seem to their Lordships relevant:

(1) Of course no tax literally falls on "property" only as opposed to "persons". All taxes are physically paid by persons.

But (2) this particular tax cannot be exacted as a debt from the person on the assessment roll. Provisions for exacting taxes on land as debts due from the person assessed (see s. 305 of *Municipal District Act*) are not reproduced when it comes to taxes on personal property.

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(3) The provincial Acts in this connexion in some passages speak of tax on personal property or tax on persons in respect of their personal property, almost interchangeably; but it is perhaps not without importance that the actual charging section in the present case—s. 288 of the *Municipal District Act*—speaks of a tax "upon the assessed value of all . . . . personal property". The section reads as follows:

"288. Upon the completion of the estimate of probable expenditure the council shall proceed to make an estimate of the probable revenue of the municipal district for the year to be derived from business taxes and sources of revenue other than taxation, and shall by by-law authorize the secretary-treasurer to levy for ordinary municipal purposes upon the assessed value of all lands, improvements and personal property set out in the assessment roll, a tax at such uniform rate on the dollar as the council deems sufficient to produce the amount of the expenditures as estimated by the council less the amount of the estimated probable revenue from business taxes and sources other than taxation, due allowance being made for the amount of taxes which may reasonably be expected to remain unpaid, and for the offset of business or improvement tax as hereinafter provided for." [re-enacted 1944, c. 41 s. 26; am. 1947, c. 49, s. 11]

It may well be, therefore, that the tax is properly to be regarded as a tax on property and on property only. There is as against this the following circumstances to be taken into account: In cases, at least where *land* has been concerned, it has been held that if the language of the provincial statute is sufficiently explicit and compelling, A may be taxed in respect of property "belonging" to B. Even where B is exempt, *e.g.*, where B is the Crown, property belonging to B may be taken as a fictional measure of the tax to be exigible from A, provided always the Act makes this intention perfectly clear.

Their Lordships have not in mind the case often cited in this connexion of *Halifax* v. *Fairbanks*, [1927] 4 D.L.R. 945, [1928] A.C. 117, because in that case the special legislation provided that land let by the subject to the Crown should be treated as still occupied by the subject. This is clearly not a case of property "belonging" to the Crown at all. The property "belonged" to the subject and was let to the Crown. The same consideration applies to *Vancouver* v. *A.-G. Can.*, [1944], 1 D.L.R. 497, S.C.R. 23, where again the subject (the C. Nor. P. Railway) leased land to the Crown and was assessed under the terms of the provincial statute which charged the lessor in respect of the whole value of such land. Rather they have in mind cases such as *Smith* v. *Vermilion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569; *Spy Hill* v. *Bradshaw* (1912), 7 D.L.R. 941, and *Montreal* v. *A.-G. Can.*, 70 D.L.R. 248, [1923] A.C. 136.

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In *Smith* v. *Vermilion Hills*, the appellant was assessed, under Saskatchewan Statutes 6 Edw. VII., c. 36 and 7 Edw. VII., c. 3, in respect of Dominion land of which he held grazing leases from the Crown. "Land" was defined in such statutes as including any estate or interest therein. It was held that the statutes should be read as imposing the tax on the appellant's interest in the land. This case is clearly distinguishable from the present appeal on the ground that the relevant provincial statute dealing with "land" (in which successive interests and estates can subsist) provided that that term should include "any estate or interest therein" and that every "owner or occupant" should be liable to be taxed for "land owned or occupied by him".

It was held, affirming the Supreme Court of Saskatchewan, 13 D.L.R. 182, 6 S.L.R. 366, and the Supreme Court of Canada, 20 D.L.R. 114, 49 S.C.R. 563, that the tax was not imposed on the land itself, so as to conflict with s. 125 of the *B.N.A. Act*, but was imposed only on the "interest" of the appellant as a tenant thereof. The Supreme Court of Canada had reached a similar conclusion in *Calgary & Edmonton Land Co.* v. *A.-G. Alta.* (1911), 45 S.C.R. 170.

In *Montreal* v. *A.-G. Can.*, 70 D.L.R. 248, [1923] A.C. 136, the material provincial taxing provision (s. 362A, added to the Montreal Charter by 1907 (Que.), c. 63, s. 19) provided that persons occupying for certain purposes Crown buildings or lands should be taxed as if they were actual owners. The tenant of such buildings and lands did not pay. The Judicial Committee held, following the *Vermilion Hills* case, that the tax was only on the tenant's interest during his occupation, and was not a tax "on" Crown lands and as such *ultra vires* s. 125 of the *B.N.A. Act.*

In the present case:

(1) "Lands" are not involved, but personal property, in which estates do not exist;

(2) there is no express provision that the subject is to be liable to any extent in respect of Crown property, or that the exemption accorded to such property shall not extend to the subject who may have some interest therein (contrast *cf.* *Montreal* v. *A.-G. Can. supra*); 1951 4 D.L.R. p. 150.

(3) all that is said is that (without specific reference to Crown property) the subject shall be liable where in legal possession;

(4) this leaves it open to doubt whether "person in possession" covers a person in possession of Crown property. Where the terms and scope of incidence of such a provision are in any doubt they should if possible be construed so as not to conflict with s. 125 of the *B.N.A. Act*—and that accord can in the present case best be secured by reading persons "in legal possession" as limited to persons who would be taxable if owners in possession; and the Crown, who are the owners, would not have been taxable if in possession;

(5) lastly, according to the terms of s. 26(1)(*l*) itself the person to be entered on the assessment roll is not the person

in legal possession of any personal property, but the person "in legal possession of assessable personal property"; and Crown property not being taxable is *a fortiori* non-assessable.

For these reasons it appears to their Lordships that even if motor vehicles had not been included in the assessment, it would still, for the reasons indicated above, have been invalid.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be allowed, the judgment of the Supreme Court of Canada set aside and the judgment of the Appellate Division of the Supreme Court of Alberta restored, and that the respondents ought to pay the appellants' costs of the appeal to the Supreme Court of Canada. The respondents must pay the appellants' costs of this appeal.

Appeal allowed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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Before LORDS PORTER, OAKSEY, REID, TUCKER and ASQUITH OF BISHOPSTONE

WEST CANADIAN COLLIERIES LIMITED ET AL

(PLAINTIFFS) RESPONDENTS

v.

ATTORNEY-GENERAL OF ALBERTA

(DEFENDANT) APPELLANT

AND

ATTORNEYS-GENERAL OF MANITOBA AND SASKATCHEWAN

(INTERVENERS)

*Constitutional Law—Natural Resources Agreement Acts of 1930 and B.N.A. Act, 1930—Interpretation of S. 2 of Schedule Confirmed Thereby—Invalidity of Provincial Act Increasing Royalties on Coal Payable under Grants or Leases Prior to Transfer of Resources—"Contracts to Purchase or Lease * * * and Every Other Arrangement"—"Similar Agreements"—"Apply Generally * * * Irrespective of Who May Be the Parties."*

Constitutional Law—Whether Invalid and Valid Parts of Statutes Severable—Test of Severability.

Statutes—Exception to Provisions of—Scope of Exception.

Sec. 8 of the Alberta statute, 1948, ch. 36, which added sec. 44c to *The Provincial Lands Act*, RSA, 1942, ch. 62,* provided that, notwithstanding the terms and provisions of any agreement for sale or lease, where the payment of a royalty had been reserved to the crown in the right of the Dominion or of a province, then there should be payable under such leases of coal a royalty of 10 cents per ton and in the case of grants of coal in fee simple a royalty of 15 cents per ton.

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Held the section is wholly *ultra vires*, since it is in conflict with sec 2. (quoted *infra*) of the schedule to *The Alberta Natural Resources Acts*, 1930, ch. 21 (Alta.), and 1930, ch. 3 (Dom.) both confirmed by the *British North America Act*, 1930, ch. 26 (Imp.).

The words in said sec. 2, "contracts to purchase or lease Crown Lands * * * and every other arrangement," are not limited to executory agreements or arrangements but include conveyances or grants—and even a lease is a conveyance—which although executed are subject to outstanding obligations of an executory nature, such as obligations to pay royalties or rents.

Even assuming that said sec. 8 is legislation applying "to all similar agreements" within the meaning of the exception in sec. 2 of the schedules to said Acts of 1930 (sometimes referred to as the Transfer Agreement Acts) it

*The *Provincial Lands Act* was repealed by *The Public Lands Act, 1949*, ch. 81, but a section in the exact wording of said sec. 8 was included as sec. 216, in *The Mines and Minerals Act*, 1949, ch. 66.—Ed.

is, nevertheless, not legislation which, within the meaning of the exception, applies "generally" to such agreements "irrespective of who may be the parties thereto," within the meaning of the exception, for it applies only to agreements to which the crown (whether in right of the Dominion or of a province) is a party; it does not apply when the agreement is between a private grantor or lessor and a private grantee or lessee, see *Anthony v. Atty.-Gen. for Alta.* (No. 2) [1942] 1 WWR 833, varied [1942] 2 WWR 554 (Alta. App. Div.) which was affirmed [1943] SCR 320, 1 Abr Con 1124.

The objection that the scope of an exception in a statute is presumed not to exceed or broaden the scope of the substantive provision to which it is an exception gives way when the words used in the excepting provision are sufficiently clear, as they are in the exception in question here. Not merely that part of said sec. 8 which refers to contracts made by the crown in the right of the Dominion, but also the part referring to contracts made by the crown in the right of the province, in other words the whole section, is *ultra vires*. This conclusion follows the application of the test laid down in *In re Grain Futures Taxation Act; Atty.-Gen. of Man. v. Atty-Gen. of Can.* [1925] 2 WWR 60, at 64-65, 11 Can Abr 402 (P.C.)..

Note up with 1 CED (CS) *Constitutional Law*, secs. 23B, 38, 61, 62; 3 CED (CS) *Mines and Minerals*, sec. 8; *Statutes*, sec. 57; *Words and Phrases* (1947-1952 Supps.).]

Appeal by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta, (1951) 3 WWR (NS) 1, which affirmed the judgment of McLaurin, J. (now C.J.T.D.), (1951) 1 WWR (NS) 622. Appeal dismissed, with costs, with a variation of the judgment of the trial judge by substituting a declaration that sec. 8 of the Alberta statute, 1948, ch. 36, is *ultra vires* for the declaration that said section does not apply to the leases and lands in question.

H. J. Wilson, Q.C., Deputy Attorney-General, *W. Y. Archibald* and *Frank Gahan*, for defendant, appellant.

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H. S. Patterson, Q.C., and *Lord Hailsham*, for plaintiffs, respondents.

M. C. Shumiatcher, Q.C., for Attorney-General of Saskatchewan, intervener.

March 24, 1953.

The judgment of their Lordships was delivered by

Lord Asquith of Bishopstone—This is an appeal by the defendants in the action from a judgment of the appellate division of the Supreme Court of Alberta, (1951) 3 WWR (NS) 1, affirming a judgment of the trial division of that court, (1951) 1 WWR (NS) 622. The short point in the appeal is this:

The plaintiffs were grantees or lessees of mineral lands and mining rights in the province of Alberta (or in territories from which, in 1905, that province was carved out). The grants and leases in question were originally made by the crown in right of the Dominion, in which, in 1870, the parent territories had been vested. They were made under powers conferred by a series of Dominion statutes called the *Dominion Land Acts*, and by regulations and orders in council from time to time made in pursuance of those Acts.

In 1930, by three concurrent enactments (of the province of Alberta, 1930, ch. 21; of the Dominion, 1930, ch. 3; and of the Imperial Parliament, *British North America Act, 1930*, ch. 26) triple statutory force was given to a so-called "transfer agreement" concluded in the preceding year. By this agreement, which was in the nature of a novation, the mineral lands and rights situate in certain provinces and theretofore vested in the Dominion were transferred by the Dominion to those provinces, including the province of Alberta; and the transferee provinces undertook to carry out according to its terms every contract to purchase or lease any crown lands, mines and minerals made with the crown in right of the Dominion before 1930 (see sec. 2 of the [schedule to] the Transfer Agreement Act [*The Alberta Natural Resources Act*] which, together with the other relevant statutory provisions, will be set out in full hereinafter).

In 1948 the province of Alberta purported to pass a statute (ch. 36) sec. 8 of which fixes the royalties payable under such leases at 10 cents per ton on coal mined, and in the case of grants in fee simple at 15 cents per ton on coal mined, "notwithstanding the terms and provisions of any * * * agreement for sale, or lease * * * where the payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the Province * * *." 1953 8 W.W.R. p. 278

The various mineral grants and leases held by the plaintiff are ranged in certain categories of each of which a "type" is conveniently set out in the agreed statement of facts (record, pp. 9-13). Thus we have grant type I, grant type II, lease type I, lease type II, and lease type III. To these reference will be made later. The plaintiffs in the prayer to their amended statement of claim claim:

"*(a)* A declaration that said Section 8 of Chapter 36 of the Statutes of Alberta, 1948, does not apply to the said leases and lands.

"*(b)* A declaration that said Section 8 of the Statutes of Alberta, 1948, is *ultra vires*."

The trial division of the Supreme Court of Alberta awarded a declaration in terms of par. *(a)* of the prayer, viz., that sec. 8 of the 1948 Act "does not apply" to any of these five types of transaction. The trial judge did not expressly make the declaration prayed for under par. *(b)* but it would appear that he made the declaration under par. *(a)* because he considered that the impeached provision was in conflict with the 1930 legislation and consequently *ultra vires* and void (see, e.g., the passage in record, p. 26, lines 22-24).

The appellate division dismissed the appeal but their reasoning was slightly different as it turned largely on the decision of the Supreme Court of Canada in *Huggard Assets v. Atty.-Gen. for Alta.* [1951] SCR 427 (affirming [1950] 1 WWR 69) from which decision, since, an appeal [not yet reported] has been allowed by this Board.

Their Lordships proceed to set forth in detail the relevant statutory provisions and the effect of their interaction.

Secs. 1 and 2 of the [schedule to] the Transfer Agreement Act of 1930 are as follows:

"1. In order that the Province may be in the same position as the original provinces of Confederation are in virtue of section 109 of *The British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this Agreement and subject as therein otherwise provided, belong to the Province,

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subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of

this Agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this Agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

"2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interest therein, irrespective of who may be the parties thereto."

Sec. 8 of the 1948 Alberta Act [which added sec. 44*c* to *The Provincial Lands Act*, RSA, 1942, ch. 62*] is as follows:

"44*c*. Not withstanding the terms and provisions of any certificate of title, agreement for sale, or lease which conveys coal or the right to mine, win, work or excavate the same, where the payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the Province, there shall be payable to the Minister on, from and after the first day of April, 1948,—

"*(a)* a royalty of ten cents per ton on any coal mined or excavated from any land, the title to which is held under lease from the Crown in the right of the Dominion or in the right of the Province;

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"*(b)* a royalty of fifteen cents per ton on any coal mined or excavated from any land, the title to which is held in fee simple, or under an agreement for sale from the Crown in the right of the Dominion."

* See footnote, *ante*, p. 715.

It may be said with sufficient accuracy for the present purpose that the royalties imposed by sec. 8 of the 1948 Act in every case exceeded (indeed roughly doubled) the royalties payable under the terms of the typical grants and leases in question. Under the terms of these instruments 7 cents a ton were payable in respect of grants and 5 cents a ton in respect of leases. At the time when each of the "typical" grants and leases were made, these were according to the "agreed statement of facts" the rates of royalty specifically authorized by the regulations in force at the time, subject to the qualification that in grant type I no specific royalty at so many cents per ton is provided for, but a royalty at such rate per ton "as may from time to time be specified by our Governor-in-Council."

Having regard however to the view which their Lordships take of the validity of sec. 8 of the 1948 statute, the detailed terms of the five types of grant and lease are not important.

That view may be stated succinctly in advance of the reasoning which appears to their Lordships to support it. It is that sec. 8 is in conflict with sec. 2 of the [schedule to the] Transfer Agreement Act, is wholly *ultra vires*, and null and void for all purposes.

Sec. 2 of the [schedule to the] 1930 Act or Acts falls into two compartments: (1) A substantive provision extending up to the words "by legislation or otherwise;" and (2) A proviso, beginning with the word "except" and occupying the rest of the section.

The question whether sec. 8 of the 1948 Act conflicts with this provision, and if so to what extent, depends on the true construction of each of these portions of sec. 2 of [the schedule to] the *Transfer Agreement Acts*. It will be convenient to deal with those portions separately and seriatim.

As to the first portion of sec. 2 whereby the province agrees to "carry out * * * every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise:" The appellant has argued that the contracts, etc. here referred to are limited to executory agreements or arrangements and do not include conveyances or grants which, it

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is said, absorb and merge the contracts which lead up to them; but where a conveyance—and even a lease is a conveyance—has been executed but is subject to outstanding obligations of an executory nature, such as an obligation to pay royalties or rent, their Lordships entertain no doubt that such a state of affairs is covered by the words "contract to purchase or lease any Crown lands * * * and every other arrangement * * * ."

If therefore the section ended there—before the exception or proviso which occupies the last five lines of the section—it would be in flat contradiction of sec. 8 of the 1948 Alberta Act. Sec. 2 of the 1930 Act, which has the force *inter alia* of Imperial legislation, provides that the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the province after the transfer of mineral rights to the latter. Sec. 8 of the provincial Act of 1948 is a naked assertion that the terms of such instruments can be wholly disregarded. This, and nothing less, is what the word "notwithstanding" in its context necessarily implies. Unless therefore there is something in the exception to sec. 2 of the 1930 Act to save sec. 8 of that of 1948, sec. 8 is *ultra vires* the Act of 1930, and the only question would be whether it is void in whole or only in part.

Before however embarking on that question their Lordships must consider the effect of the "exception" within one or other limbs of which the defendant contends that sec. 8 falls, and by so falling is saved:

(1) One limb excepts cases where all the parties other than Canada consent. This can be disregarded for by clause 13 of the agreed statement of facts it is admitted that there was no such consent.

(2) A second limb of the exception excuses compliance with the enacting words in so far as the exempting legislation "may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto."

It is contended by the defendant that sec. 8 of the 1948 Act is legislation "applying generally," etc. This contention cannot in their Lordships' view be sustained. Sec. 8 assuming it to apply to "all similar agreements," is not

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legislation "applying generally" to such agreements "irrespective of who may be parties thereto," for it only applies to agreements to which the crown (in right whether of the Dominion or a province) is a party. It does not apply when the agreement is between a private grantor or lessor—such as the Canadian Pacific Railway or the Hudson's Bay Company—and a private grantee or lessee—a distinction recognized and applied in *Anthony v. Atty.-Gen. for Alta.* (No. 2) [1942] 1 WWR 833 [varied (1942) 2 WWR 554 (Alta. App. Div.) which was affirmed (1943) SCR 320].

The objection that the scope of an exception is presumed not to exceed, or broaden, the scope of the substantive provision, to which it is an exception, gives way when the words used in the excepting provision are sufficiently clear, as their Lordships consider that, in this passage, they are.

It follows that secs. 8 of the Act of 1948 is *ultra vires* sec. 2 of the 1930 Acts and is invalid; and the next question is whether it is void in whole; or severable; valid in part and void in part. It is suggested that it is valid in part, namely, that part which refers to "contracts," etc., made by the crown in right of the province, though not in respect of that part which refers to contracts made by the Dominion. Their Lordships are of opinion that it is wholly *ultra vires* and wholly void. The test is very clearly laid down by Lord Haldane in *In re Grain Futures Taxation Act; Atty.-Gen. for Man. v. Atty.-Gen. of Can.* [1925] 2 WWR 60, at 64-5, [1925] AC 561, at 568, 94 LJPC 146:

> "If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agreed with Duff, J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form."

If these tests, especially that embodied in the last four lines, be applied, it is plain that sec. 8 is wholly void, notwithstanding that if the portion which relates to royalties reserved on coal from land leased by the crown in right of the province stood alone it might be valid. If the latter provision stood alone and the rest were excised, the clause would be not only truncated but reduced to a shadow.

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Their Lordships have not been asked for a declaration as to the validity *vel non* of the five typical transactions but only for declarations (1) that sec. 8 of the Alberta statute does not apply and (2) that it is *ultra vires*. Their Lordships are of opinion that it is *ultra vires*.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed but that the order of the trial judge should be varied by substituting declaration *(b)* for declaration *(a)*. The appellants must pay the costs of the appeal.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Before Lords Porter, Oaksey, Reid, Tucker and Asquith of Bishopstone

HUGGARD ASSETS LIMITED

(Plaintiff) Respondent

v.

ATTORNEY-GENERAL FOR ALBERTA AND MINISTER OF LANDS AND MINES FOR ALBERTA

(Defendants) Appellants

and

ATTORNEY-GENERAL OF CANADA ET AL

(Interveners)

Mines and Minerals—Oil and Gas—Grant by Dominion in Fee Simple of Surface Rights Including Petroleum and Natural Gas—Reservation of Royalty "From Time to Time Prescribed"—No Existing Royalty—Right to Impose Royalty Thereafter—Interest of Crown Transferred to Province by Alberta Natural Resources Act—Province's Assertion of Right to Impose Royalty—"Variable" Royalty.

Constitutional Law—Power of Parliament after 1870 to Vary Laws of Land Tenure in Rupert's Land—"Free and Common Socage."

Constitutional Law—Orders-in-Council and Regulations Provided For by Dominion Lands Acts Distinguished.

The imposition by the provincial orders-in-council in question herein of royalties on the petroleum and natural gas derived by the plaintiff (respondent on this appeal) from the area in question *held* to be within the power of the crown in the right of the province.

The right to levy a "variable" royalty on said lands was a "right" which within sec. 3 of the Natural Resources Transfer Agreement (confirmed by the Dominion, provincial and Imperial statutes of 1930) was by "contract * * * or other arrangements * * * relating to any of the lands, mines, minerals or royalties" originally reserved to the crown in right of the Dominion and by secs. 1 and 3 thereof was in 1930 transferred from the crown in right of the Dominion to the crown in right of the province of Alberta, which accordingly was justified, through its Lieutenant-Governor in Council, in levying by the various orders-in-council of 1941-1948 (set out in par. 6 of the statement of claim) the royalties complained of by the plaintiffs (respondents) in the present case.

The term "variable royalty," *supra*, is used to describe a royalty which the grantor claims the right to impose for the first time after the contract or grant, at any figure he chooses, or to vary from time to time at his uncontrolled discretion.

The reddendum of the grant in question herein did, according to its tenor, empower the crown to prescribe royalties in respect of petroleum and natural gas by a regulation posterior to the date of the grant although none was prescribed by any regulation anterior to that date.

The Dominion parliament was competent at all material times, after 1870, by clear enactment to repeal or vary any law as to land tenure prevailing in Rupert's Land before that region was in that year vested in the Dominion, even if this meant introducing forms of tenure unknown in the past to English law or forbidden by it. The question herein is not whether the Dominion possessed the necessary power but whether in fact is exercised it.

It was not intended that in dealing with special or hard cases under sec. 76 (*k*) of ch. 20, 1908 (Dom.) the discretion of the crown should be fettered or controlled by incidents of English feudal land tenure. It had been expressly enacted that the Dominion parliament could repeal, vary or modify any English law prevailing before 1870 in territories such as Rupert's Land, and territories like Alberta which might be carved out of it. In providing as it did in sec. 76 (*k*) of the 1908 Act for a discretionary power to deal with hard or anomalous cases parliament was arrogating to itself the right to infringe the requirements of "free and common socage," so far as the end in view required. Where the justice of the individual case required it, it would be unreasonable (unless the language of the material enactments forces such a conclusion) to hold that the crown's liberty to deal with such cases was intended to be exercised only within the limits set by a rigid respect for the obscure and debated frontiers of historical socage tenure. 1953 8 W.W.R. p. 562

The only explanation of why the *Dominion Lands Acts* of 1886 and 1908 provided that some things could be done by regulations and some by order appears to be that a regulation normally (though perhaps not quite necessarily) applies uniform treatment to every one, or to all members of some group or class. There is one and the same "rule" ("*regula*") for all. On the other hand there may be special cases which the rule did not contemplate ("*casus omissi*" are expressly instanced in the Acts) or to which owing to special circumstances it cannot apply without hardship, or without violating the spirit—"the true intent" of the Act; and the object of the "order-making" power is to enable the crown to make special and equitable provision *ad hoc* for such cases.

[Note up with 1 CED (CS) *Constitutional Law*, secs. 4, 23A, 82; 2 CED (CS) *Crown, sec.* 10; 3 CED (CS) *Mines and Minerals*, secs. 1-5, 8, 12A; *Real Property*, sec. 1; *Statutes*, sec. 24; *Words and Phrases* (1947-1952 Supps.).]

Appeal by Defendants from the judgment of the Supreme Court of Canada [1951] SCR 427, which dismissed by a majority decision the defendants' appeal from the judgment of the Appellate Division of the Supreme Court of Alberta [1950] 1 WWR 69, which dismissed, the court being equally divided, the defendants' appeal from the judgment of Boyd McBride, J. [1949] 2 WWR 370. Appeal allowed and action dismissed; no costs.

H. J. Wilson, Q.C., Frank Gahan, Q.C., and W. Y. Archibald, for defendants, appellants.

Geoffrey Cross, Q.C., and *Nigel Warren*, for plaintiff, respondent.

Frank Gahan, Q.C., for Attorney-General of Canada, intervener.

H. J. Wilson, Q.C., for Attorney-General of Manitoba, intervener.

M. C. Shumiatcher, Q.C., for Attorney-General of Saskatchewan, intervener.

March 24, 1953.

The judgment of their Lordships was delivered by

LORD ASQUITH OF BISHOPSTONE—The issue raised on this appeal is shortly whether the crown in right of the province of Alberta is entitled to levy certain royalties from Huggard Assets Ltd., respondents in the appeal and plaintiffs in the action, on petroleum and natural gas derived by them from a certain area in that province.

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The facts leading up to this litigation, which will have to be unfolded in more detail later, can with advantage be stated in brief outline at the outset. The plaintiffs claim an interest in these minerals as successors of a company called the Northern Alberta Exploration Company Limited, the original grantees of the area under a grant in the form of a patent dated August 25, 1913 (Ex. 8 of the appendix of exhibits). The grantor was the crown in right of the Dominion.

The crown in right of Alberta succeeded, under the transfer agreements Acts of 1930, to any right which the crown in right of the Dominion had theretofore owned in crown lands, mines and minerals situate in Alberta, and royalties derived therefrom together with the right to enforce "any power or right, which by any contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under such Act, is reserved" to the crown in right of the Dominion. These provisions have been described as constituting a "statutory novation," the province stepping into the shoes of the Dominion, and succeeding to its rights. The main issue in the case is whether the Dominion, at the time of the grant in 1913, was entitled to the right to exact royalties, which are now in dispute. The determination of that issue depends on the answer to the two further questions.

(1) What, on its true construction, does the grant of 1913 in its reddendum purport to provide in respect of royalties payable by the grantee?

(2) Whatever on its true construction that provision means, is it legally valid and enforceable?

It may be convenient to set out the habendum and reddendum of the grant at this stage:

> "To have and to hold the same unto the grantee in fee simple.
>
> "Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of our Lord one thousand nine hundred and nine [and there follow provisions for forfeiture on failure to pay such royalty]."

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At the time of the grant there were regulations in existence affecting the terms on which the Dominion could dispose of crown lands, mines and minerals in Alberta, but none of these regulations prescribed a specific rate of royalty chargeable in respect of petroleum or natural gas derived from these sources.

(1) The first question which their Lordships have to decide is whether in these circumstances, having regard to the terms of the grant, and in particular to the words "from time to time," the reddendum purported to entitle the crown, as grantor—then in right of the Dominion—to levy royalties "prescribed" by a regulation, or a succession of regulations, made *after* the date of the grant. Their Lordships have considered this question and are clearly of opinion that the answer must be in the affirmative. The grant *does* purport to confer such a right on the grantor. This was the unanimous opinion of the Supreme Court of Canada ([1951] SCR 427). Any other answer would render the words "from time to time" meaningless. It is true that in *Majestic Mines Ltd. v. Atty.-Gen. for Alta.* [1941] 2 WWR 353, affirmed [1942] 1 WWR 321, [1942] SCR 402, a different conclusion was reached but the crucial words "from time to time" were absent, and clearly the decision might have been the other

way if they had been present. (Their Lordships may point out, as some argument was based on the words "if any" as used in the reddendum in the present case, that in their view these words plainly qualify the word "royalty" and not "petroleum or natural gas," or "natural gas" only.)

(2) This answer, however, merely disposes of the problem what it was that the grant *purported* to provide. A more difficult question remains, viz., whether the grant could validly contain such a provision. This question emerged when, some time after the 1930 transfer agreement had vested crown lands, mines and minerals (situate in Alberta) and rights and powers in respect of royalties on such lands, etc., in the crown in right of that province, the province, by various orders-in-council made between 1941 and 1948 (ref.: S.C. p. 3, par. 6) purported to impose a royalty on any petroleum and natural gas derived from lands, etc., vested in the province by the 1930 Act. As the result of this imposition the plaintiffs brought the present action and claimed in the prayer to their statement of claim the following relief:

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"1. A declaration that the Lieutenant-Governor in Council (of Alberta) was not entitled to exact any royalty with respect to petroleum and natural gas produced from the lands.

"2. An order rectifying the Patent by striking out all references to royalties."

Four points of varying importance may conveniently be noted here:

(a) No facts are alleged or were proved which could possibly support a plea of rectification. There was no preceding contract representing the real bargain to which the terms of the grant failed to give effect. This disposes of the second branch of the prayer.

(b) The plaintiffs at no stage contended—or did the defendants—that the grant was *wholly* invalid. The plaintiffs impugned only the provision as to royalties, wishing this to be deleted and the rest to stand.

(c) No point was taken in the statement of claim or at any stage of the argument till the case was heard before this board, to the effect that a grant in terms of this reddendum or a royalty levied in accordance therewith could only be

authorized by a regulation as opposed to an order-in-council. At every stage until the ultimate appeal an order-in-council was assumed to be as good as a regulation for these purposes. Nevertheless much of the board's time was occupied with this argument and with a number of other contentions not raised below.

(d) No point was taken by counsel prior to the hearing before this board that the English *Statute of Tenures, 1660*, 12 Car. II, ch. 24, extended to this region of Canada and invalidated any grant of minerals in fee simple on terms which permitted the crown as grantor to levy a royalty the existence or quantum of which could be determined from time to time by its own caprice or whim. This last point was, however, raised *proprio motu* by the Supreme Court of Canada, which by a majority of four to three decided the appeal before them largely on it.

It is now time to indicate the course which the proceedings below followed. The Supreme Court of Alberta, Trial Division (Boyd McBride, J.) decided for the plaintiffs ([1949] 2 WWR 370). It considered that only one point—the construction of the reddendum of the grant—was in issue. The learned judge decided—erroneously in their Lordships' view—that the reddendum did not on its true construction purport to entitle the crown as grantor to impose royalties on petroleum and natural gas by regulations to be made in future, none having been imposed thereon by any regulation in force when the grant was made. He did not consider what might be the validity of a provision which *did* purport to give the crown such a right but decided for the plaintiffs on the ground that the crown did not in the grant even stipulate for the power it claimed later to exercise.

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The defendants appealed to the Appellate Division of the Supreme Court which, the four learned judges being equally divided, dismissed the appeal ([1950] 1 WWR 69).

There was then a further appeal to the Supreme Court of Canada. The learned judges (seven in all) were unanimously of opinion that the learned trial judge and the appellate division were in error in supposing that the reddendum of the grant did not purport to have a prospective operation. They all thought that according to its tenor it empowered the crown to prescribe royalties in respect of petroleum and natural gas by a regulation posterior to the date of the grant,

albeit none was prescribed by any regulation anterior to that date. In this view their Lordships have recorded their concurrence. The Supreme Court, though favourable to the appellant defendants on this point, dismissed the appeal by a majority of four to three, for a different reason—one which, their Lordships were informed, was not raised before them by counsel, and which had certainly been raised by no one in the trial or appellate divisions.

The main reason for this decision was that owing to the supposed application of Charles II's *Statute of Tenures, 1660*, a royalty in the form contended for by the crown was contrary to law, bad for uncertainty, and void, and that no competent legislation had validated it. They further held that, the condition for payment of royalties being bad, the forfeiture clause conditioned on its breach was bad also, and that the grant was valid minus the provision as to royalties.

Such is a bare summary of the three Canadian decisions upon which the appeal came before this board.

The ratio on which the Supreme Court of Canada reached its conclusions, albeit by a bare majority, must be most carefully weighed, and a more precise account of it given, for so far it has only been adumbrated.

But before doing so, their Lordships observe that it may prove convenient to describe a royalty which the grantor claims to be entitled to impose for the first time after the contract or grant, at any figure he chooses, or to vary from time to time at his uncontrolled discretion, as a "variable royalty." It will also make for brevity to refer to the areas which came to be called after 1670 "Prince Rupert's Land" and the "North West Territories" simply as "Rupert's Land."

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The argument in support of the proposition that the grant could not validly provide for a "variable royalty" in this sense of the term may be summarized under the following heads:

(1) A royalty is akin to rent if not a species of it. A rent must be "certain," and a rent variable at the whim of the lessor is uncertain. So, therefore, is a royalty similarly variable, and unenforceable independently of any argument founded on the Statute of King Charles II.

(2) The *Statute of Tenures, 1660*, applies to Canada or that part of it called Rupert's Land, which was vested in the Dominion in 1870 and from which in 1905 Alberta (including the mineral lands in question) was carved out. This statute by clauses 2 and 4 abolishes grants in fee of land on tenures (such as the old English tenure by knight service) for which the consideration consisted at one time of uncertain services, or of payments by way of composition for such services which reflected in their quantum or in the method of their determination the uncertainty of the services themselves. Clause 4 provided that "all tenures hereafter to be created by the King's Majesty * * * upon any grants * * * of any estate of inheritance at common law * * * shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight service, and shall be discharged of all wardship, value and forfeiture of marriage, livery, *primer seisin, ousterlemain,*" and certain other burdens incident to tenure by knight service. Clause 4 relates to estates to be created "hereafter." Clauses 1 and 2 abolish knight service tenure and its characteristic burdens (which in those clauses were described as including "*escuage*") in respect of existing estates, and convert them also into tenure by free and common socage, free from those burdens for the future. The hall mark, it was said, in *Littleton, Coke on Littleton*, and *Blackstone*, of tenure by "free and common socage" was and is that any services, or cash composition in lieu thereof, must be "certain;" and, so the argument continued, since a "variable royalty" could not be described as "certain" in any sense of the word, *ergo* "a variable royalty" was prohibited by the statute.

(3) It was further contended that whether or not the Act of 1660 applied to Rupert's Land with the results described in (2) above, in any case the charter by which in 1670 Charles II granted Rupert's Land to the Hudson's Bay Company expressly included a term providing for the prevalence of free and common socage as the standard basis of tenure of land therein. The same result, it was suggested, could be reached if Rupert's Land was a "settled" colony (as it has been since held to be, *Walker v. Walker* [1919] 2 WWR 935, [1919] AC 847, 88 LJPC 156; *Board v. Board* [1919] 2 WWR 940, [1919] AC 956, 88 LJPC 165) even if there were no such provision in the charter, for it is well established that settlers import into a settled colony the common and statute law of their country as they existed at the time of settlement and

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so far as applicable to the settled territory. But the terms of the charter would seem to make resort to this rule superfluous so far as the establishment of socage tenure is concerned.

All these three arguments, even if otherwise sound, are liable to be met by two answers: (1) That a "variable" royalty is consistent with "free and common socage," or (2) That, if it is not, Dominion legislation has displaced the requirement of such socage tenure and validated a form or forms of tenure which are inconsistent with it. The second of the three arguments—that based on the 1660 Act—may, in addition to these possible objections, be exposed to a third, namely, that the Statute of Charles II never applied to Canada, or to the material part of Canada, namely, "Rupert's Land."

Their Lordships proceed to consider each of these three arguments in turn—in the first instance in abstraction from the possible effect of any "validating" legislation.

(1) They do not consider that the first of the arguments in question is established. There may well be an analogy between royalties in respect of a grant and rent in respect of a lease and it may well be that rents must be in some sense of the word "certain." But what does "certain" mean in this connection? What is an "uncertain" rent? A rent, payable in year 1, the amount of which is to depend on events which cannot happen till year 3, would seem to be, in any sense of the word, "uncertain" and bad. The tenant could never tell till year 3 how much rent he was liable to pay in year 1; consequently neither he nor his lessor could know for how much, if anything, the latter could in year 1 distrain. This is an extreme case. Short of it, it is clear that a fluctuating rent is not as such necessarily "uncertain"—certainly not if it is mathematically calculable, so as to attract the operation of the maxim "*certum est quod certum reddi potest.*" The only decided case cited to the board in which a rent was held "uncertain" is the old case of *Parker v. Harris* (1692) 1 Salk 262, 91 ER 230, the report of which is both laconic and obscure. It would seem that what was "uncertain" there was not the quantum of the rent but the times at which it was to be payable. It is said in the present case that the royalty is "uncertain" because its amount depends on the whim, from time to time, of the grantor. It seems doubtful whether this quality is fatal. In this very case, the charter of 1670

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provided for a royalty which is some sense depends on the whim of the grantor, the King. He is to receive two elks and two black beavers every time he visits the territories in question. No one can tell whether he will visit the territory at all; nor if he does, how often; yet his unpredictable election to visit it never, seldom or repeatedly determines the number of elks or beavers to be "yielded up." In these circumstances their Lordships are not satisfied that this contention is made out. But whether sound or unsound, it would still (like the other two) fall to the ground if adequate "validating legislation" were proved.

(2) The majority of the Supreme Court, as has been stated, based their decision, in the main, on the *Statute of Tenures, 1660*. Their reasoning assumes that this statute applied to Canada, or at least to "Rupert's Land."

The Act has no express "extent" clause. An Act of the Imperial Parliament today, unless it provides otherwise, applied to the whole of the United Kingdom and to nothing outside the United Kingdom, not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession. In 1660 there was, of course, no United Kingdom. The Acts of Union of 1706 (with Scotland) and of 1800 (with Ireland) were still in the womb of time. True, it happened that since the accession to the English throne of James I—already then King of Scotland—the same person was the sovereign of both England and Scotland, just as later the same person was to occupy the British and the Hanoverian throne. But that coincidence of sovereignties is beside the present purpose.

Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England (which since 1536 has by Act of Parliament included Wales) must depend in such circumstances on the intention of its framers, to be deduced from the nature of its subject-matter and substantive provisions. It would presumably have no such external application if its subject-matter were beyond question of merely insular and domestic import.

Their Lordships, if it were necessary to decide the point, would incline to the view that the Act of 1660 was of purely local application; that it applied to England only. Its main

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objects were two: to abolish certain oppressive incidents of feudal military tenure, "wardships," "marriage," "*primer seisin*," "*ousterlemain*" and the like. To effect this it was necessary to abolish the military or knight service tenures themselves—the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (clauses 15 to 27) by certain duties on strong liquors, for instance, beer, cider, perry and *aqua vitae*, some home produced, some imported. It seems to their Lordships strained to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country thousands of miles away which was only inhabited at the time by a few Indians and half castes, people who had never smarted under wardships, marriage and *primer seisin*, and had almost certainly never heard of them. It seems to their Lordships that these and the other provisions of the Act—notwithstanding that it provides that "free and common socage" should prevail in future, and abolishes tenure by "*escuage*"—were not intended to apply outside England and Wales, to which, along with Berwick-on-Tweed, the machinery for collecting the compensatory duties is expressly confined (clause 47).

Their Lordships have dwelt on this point somewhat at length because the judgments of the majority of the Supreme Court of Canada are so largely founded on it. Having regard however, to the conclusions they have reached on other points, it is almost academic, because apart from the rule governing settled colonies the charter of 1670 under which the Hudson's Bay Company was granted Rupert's Land provides expressly for tenure of that land in "free and common socage and not *in capite* or by Knightes' service." That being so, two questions remain:

(A) Where the terms of the grant which is in question in this case—a grant subject to a "variable royalty"—inconsistent with and in breach of the requirements of tenure in "free and common socage?"

(B) If yes, were those requirements still valid when the grant was made in 1913, or had legislation, regulations or orders passed in the meantime so far modified them as to validate the grant?

(A) The first of these questions is open to doubt for, as their Lordships have observed, in the charter itself the consideration moving from the tenant—the royalty—is as to its amount largely at the discretion of the grantor, the King of England. If he chooses never to visit the area, no royalty is payable at all; and this would seem to argue that a considerable degree of "uncertainty" in the consideration moving from the tenant is compatible with "free and common socage," notwithstanding the dicta of *Littleton*, *Coke* and *Blackstone* to the contrary. One instance given by *Littleton* (*Coke on Littleton*, 96A) of a tenure on "certain" services is where the tenure depends on the tenant shearing all sheep on the grantor's land, a service which can clearly be made more or less burdensome according as the grantor chooses to have upon his land few or many sheep. *Littleton* himself describes this as a "certainty in uncertainty."

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Rather than plunge into the jungle of learned disagreement which surrounds what is or is not involved in free and common socage, their Lordships will assume, without deciding, that it is inconsistent with the terms of the 1913 grant.

(B) Upon that assumption, the residual question is whether competent legislation has validated the grant. Their Lordships have come to the conclusion that it *has* done so.

There can be no question that the Dominion Parliament was competent at all material times, after 1870, by clear enactment to repeal or vary any law as to land tenure prevailing in Rupert's Land before that region was in that year vested in the Dominion, even if this meant introducing forms of tenure unknown in the past to English law or forbidden by it. The question is not whether the Dominion possessed the necessary power but whether in fact it exercised it.

The legislature of a new country with a small population and vast possibilities of development might well favour an elastic policy in its efforts to attract settlers, and be the less inclined to submit indefinitely to the fetters of English feudal tradition in such matters as land tenure.

By a complex of legislation between 1868-1870, into the details of which their Lordships do not think it necessary to enter, the Hudson's Bay Company surrendered its grant of Rupert's Land for £300,000, and on June 23, 1870, that

region was admitted to the Dominion. The charter of 1670 under which it had been granted to the Hudson's Bay Company expressly provided, as has been seen, that tenure should be in "free and common socage." Interim legislation (e.g., the Act of 1869 [Dom.] 32-33 Vict. ch. 3) provided that all laws in force in Rupert's Land at the time of its admission should (unless contrary to the *B.N.A. Act, 1867*) remain in force till altered. An Imperial Act of 1871 (34-35 Vict., ch. 28) "to remove doubts" confirmed all Dominion statutes relating to this transaction and gave power to the Dominion *inter alia* to make provision for the "peace, order and good government * * * of any territory not yet for the time being included in any province" (which would aptly describe that part of Rupert's Land which later became Alberta). Subsequent Dominion Acts followed containing similar provisions, e.g., the *Northwest Territories Act*, RSC, 1906, ch. 62 (which itself reproduced similar provisions in an Act of 1886 and even earlier legislation) and by sec. 12 enacted as follows:

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> "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year one thousand eight hundred and seventy, shall be in force in the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories."

This provision was in force at the time of the disputed grant of 1913.

It can hardly be said that tenure by socage was in 1870 a part of the "laws of England" *inapplicable* to Rupert's Land, since this tenure had been in force in that tract under the terms of its charter for exactly two centuries before its transfer to the Dominion. Nevertheless, the question remains whether by competent legislation subsequent to the transfer this part of the "laws of England" had been "repealed, altered, varied or modified" in such a way as to validate the present grant. Such validating provisions, if they exist, must be sought mainly, if not entirely, in the successive "*Dominion Lands Acts*" and regulations or orders made thereunder.

The Dominion Lands Act in force at the time of the 1913 grant was ch. 20 of the statutes of 1908. Before referring to its terms it may however be helpful to refer to an earlier statute, the *Dominion Lands Act*, RSC, 1886, ch. 54. Sec. 47 of that Act reads as follows:

> "47. Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council, by regulations made in that behalf,"

and was reproduced by sec. 47 of the *Dominion Lands Act, 1892*, with the addition of a proviso which does not affect the present case.

The Act of 1886 further provided, by sec. 90:

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> "The Governor in Council may
>
> * * *
>
> "*(h)* Make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect; and, from time to time, alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead."

Their Lordships pause to note two points in relation to these provisions of the 1886 Act: (1) Sec. 47 gives the Governor in Council powers as wide as are readily imaginable as to the "disposal" of coal and other minerals *by regulation*. He can impose any terms he, "from time to time," fancies, and employ any method of disposal. If this provision had stood unmodified at the time of the grant, and a regulation had been made giving effect to it, it would, in their Lordships' view, have authorized the grant notwithstanding any inconsistency between the terms of the grant and technical socage tenure. (2) Side by side with this power, in sec. 90 *(h)* there is a power to make "orders," in certain special cases, e.g., "*casus omissi*." These two parallel powers are somewhat

sharply distinguished and the distinction persists in the Act of 1908, to which reference should next be made. Before, however, going to that statute, it is proper to note that regulations under the 1886 Act (as amended in 1892) were made between 1901 and December, 1906, inclusive, in which month they were consolidated, the consolidation appearing in the appendix of exhibits as Ex. 7. They will be referred to as "the 1906 regulations" and their tenor explored later, so far as relevant.

The sections of the 1908 Act corresponding to those cited from the 1886 Act, and dealing respectively with "regulations" and "orders," are secs. 37 and 76 *(k)* of the later Act.

Sec. 37 is as follows:

"Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the Governor in Council; and these regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, in so far as they may be affected under these regulations."

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Sec. 76 *(k)* reads:

"The Governor in Council may

* * *

"*(k)* make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make any regulations which are considered necessary to give the provisions of this section full effect."

Thus this Act maintains the distinction between regulations and orders, which seemingly are intended to serve different purposes; and the distinction, in this Act of 1908, is emphasized by sec. 77 thereof.

This section reads as follows:

"77. Every regulation made by the Governor in Council in virtue of the provisions of this Act, and every order

made by the Governor in Council authorizing the sale of any land or the granting of any interest therein, shall have force and effect only after it has been published for four consecutive weeks in *The Canada Gazette*, and all such orders or regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof, and such regulations shall remain in force until the day immediately succeeding the day of prorogation of that session of Parliament, and no longer, unless during that session they are approved by resolution of both Houses of Parliament."

This section provides that, while both regulations and orders shall be laid before both Houses of Parliament within 15 days of the session next after their date, regulations (though not, apparently, orders) shall become inoperative on the day succeeding the prorogation of the session of parliament unless during the session approved by a confirmatory resolution. Orders are seemingly not now defeasible for want of such a resolution, though it will be observed that the corresponding section of the 1886 Act—sec. 91—while providing for similar formalities, does not distinguish between the effect of not complying with them in the case of a regulation on the one hand and an order on the other.

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As against this attention should be called to a difference between the language of sec. 37 of the Act of 1908 and sec. 47 of the 1886 Act, which would seem, if it is significant, to limit the almost despotic powers of disposal vested in the Governor in Council by the latter provision. For where sec. 47 spoke of "disposal" of lands, etc., "in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council," by "regulations," sec. 37 provides simply that such lands, etc., "may be sold or leased under regulations made by him." On the other hand if this change of language does impliedly narrow the powers of the Governor in Council under the 1908 Act when proceeding by regulations, there is no corresponding limitation in that Act in his powers to proceed by *order*. On the contrary an order (though no doubt it can be superseded by a later order) cannot, like a regulation, lapse for want of a confirmatory resolution, and would seem to be capable of dealing with cases uncovered, or not adequately dealt with, by any regulation.

As regards "regulations" the position is complex and obscure. But the instrument by virtue of which the grant of 1913 purported to be made was an order-in-council, or rather two such orders, dated May 31, 1911, and March 21, 1913 (being Exs. 2 and 1 [in the appendix of exhibits] respectively) and not a regulation. The point that a grant in these terms could not be made under orders but only under some regulation, and that no such regulation at the material time existed, was not taken until the case was argued before this board.

The points therefore remaining are:

(1) Did these orders, if themselves valid, purport to authorize a grant in the terms of that of August 25, 1913?

(2) Were the orders which purported to be made under sec. 76 *(k)* of the 1908 Act a valid exercise of the powers conferred by that subsection? Or should the subsection be read as not authorizing any order which runs counter to tenure by "free and common socage?"

Before grappling with these questions, it may be pertinent to ask for what reason the Acts of 1886 and 1908 provided that some things could be done by regulations and some by order. That this was done deliberately admits of no doubt. The only question is "why?"

Their Lordships can only suppose the explanation to be that a *regulation* normally (though perhaps not quite necessarily) applies uniform treatment to every one, or to all members of some group or class. There is one and the same "rule" ("*regula*") for all. On the other hand there may be special cases which the rule did not contemplate ("*casus omissi*" are expressly instanced in the Acts) or to which owing to special circumstances it cannot apply without hardship, or without violating the spirit—"the true intent"—of the Act; and the object of the "order-making" power is to enable the crown to make special and equitable provision *ad hoc* for such cases.

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If anything is clear it is that this case was a very special one, not covered by ordinary rules, and was so considered and treated by those who on behalf of the crown in right of the Dominion made the two orders—Exs. 2 and 1—and issued the grant or patent (Ex. 8).

What do the two orders provide? Their Lordships, while holding they should be read together, will deal with them, in the first instance, seriatim:

(1) *The first order, dated May 31, 1911*, opens with a reference to regulations assumed to be obsolete or rescinded—"the late regulations"—and refers to them in its last paragraph once more as "the old regulations." These are the regulations made under the 1886 and 1892 Acts, between 1901 and 1906 inclusive, and referred to above as "the 1906 regulations" because they were issued in a consolidated form in December of 1906. These consolidated regulations (Ex. 7 of appendix of exhibits) has provided (by par. 1) for the "reservation" in suitable cases for purposes of prospecting for petroleum of an area of 1,920 acres, in favour of an applicant for such reservation, of land in, *inter alia*, the province of Alberta. They further provided (par. 5 of the consolidation) that "if oil in paying quantities should be discovered by the prospector" an area not exceeding 640 acres of land, including the oil well, would be sold to the person making such discovery at the rate of $1 per acre, and the remainder of the reserved area, viz., 1,280 acres, would be sold at the rate of $3 per acre. Par. 6 provided that "a royalty at such a rate as may from time to time be specified by Order in Council will also be levied and collected on the sales of the petroleum * * *;" par. 8 provided that the patent which might "be issued for petroleum lands" would be made subject to the payment of the above royalty; and that the patent might be declared null and void for default in the payment of such royalty.

The order of May 31, 1911, when it refers to these regulations as the "late" or "old" petroleum regulations, assumes them to have been rescinded. This may be either because they were made under the 1886-1892 *Dominion Lands Acts* and not under that of 1908 or, more probably, because in 1910 there had been made new regulations purporting to rescind the 1906 regulations, and to substitute a power of leasing for a power of sale, lease or other disposal.

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These last regulations were not included in the appendix of exhibits and were only produced in the course of the argument before the board as the result of cables to Canada. It seems doubtful in the circumstances whether any notice should be paid to them at all, particularly as the board was informed that they were void or had lapsed for failure to be laid before the two Houses of Parliament or having been so laid to obtain the necessary confirmatory resolution. Let it however be assumed in the respondents' favour that the

1906 regulations were validly rescinded. Then what was their position? There was, in their Lordships' view, nothing to prevent the Minister from proposing, or the Governor in Council from making, an order-in-council, under the powers conferred by sec. 76 *(k)* of the 1908 Act dealing with a special case of hardship by providing that it would be governed by the rescinded 1906 regulations if the equity of the case appeared to him so to require. And this is what in fact the orders-in-council of May 31, 1911, and March, 1913, professed to do.

The facts leading up to both orders must here by reviewed more closely: A "reservation" had been made under the old "1906 regulations" in favour of a Mr. Bennetto on January 1, 1906, of a tract of land in Alberta, which may be called "Tract X." Bennetto had done prospecting work on that tract, which was continued by his assigns the Northern Alberta Exploration Company, the assignors to the respondents. Oil had been discovered, but not in "paying quantities;" hence no right of sale had been acquired by any one. Meanwhile the "reservation" was due to expire on June 17, 1911. The Northern Alberta Company asked for a renewal of the reservation. The order recites that large expenditure had been incurred by Bennetto and the company, and provides that the reservation of petroleum and gas rights should be extended in favour of the company for two years from June 17, 1911; but that it should apply to land other than, though overlapping with, the land originally covered by the reservations. This may be called "Tract Y." This substitution was necessitated by the acquisition by *bona-fide* squatters of a large area of riverain territory covering part of the surface of "Tract X," the original reservation. The order of 1911 finished by reciting and giving effect to the following recommendation:

> "Should oil or natural gas be discovered in paying quantities within the period of one year from the 17th June, 1911, the Minister also recommends that he be authorized to sell to the company, under the provisions of the old petroleum regulations, all the lands contained within the entire area above mentioned both as regards the surface and petroleum and natural gas rights, and that if oil in paying quantities is discovered after the expiration of the first year, but before the 17th of June, 1913, he be authorized to sell to the company the petroleum and

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natural gas rights under the entire area reserved and the surface rights of that portion lying between the southerly boundary of the McMurray Settlement and Horse Creek."

(2) *The second order-in-council, that of March 12, 1913*, recites these facts and the provisions of the order-in-council of 1911, in particular its final paragraph which has just been quoted. It does not record, and presumably it was not the fact, that within one year or even nearly two years of June 17, 1911, oil or natural gas "in paying quantities" had been discovered in the substituted area: but it does record that valuable prospecting work had been done by Bennetto and the Northern Alberta Exploration Company, and that at least $75,000 had been expended by them by October, 1912.

The order-in-council ended by providing as follows:

"That in view of the very large expenditure which the Northern Alberta Exploration Company, Limited, has incurred for the purpose of demonstrating the existence or otherwise of petroleum in the McMurray field, which demonstration must be of very great public benefit, and in view of the fact that the location first reserved for the application was lost to him through the encroachment of squatters, the Minister recommends that the above company be permitted to purchase the petroleum and natural gas rights under the entire area reserved for them by the Order in Council dated the 31st May, 1911, together with the available surface rights thereof, at the rate of $3.00 an acre, subject, however, to such rights as may be established under the provisions of the *Dominion Lands Act* and the regulations, by any persons in a position to show that they have in the meantime squatted upon these lands."

If these two orders are read together, their effect, if they are *intra vires* the statute of 1908, is to authorize the grant which followed on August 25, 1913, both as regards the price of the land and "under rights" sold and as regards royalties. The price under the grant appears to have been $3 an acre both for the surface (1,296 acres) and the mineral rights (1,320 acres) (as appears, e.g., from p. 46, line 12, of the record). If the order-in-council of 1911 (Ex. 2) had stood alone, the price would have been $1 as to part and $3 as to another part, for the order of 1911 imports the 1906 regulations and that is what they provide. But the order-in-council of 1913 (Ex. 1) alters this rate to $3 overall; and the grant

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is so far within the authority conferred by the two orders read together. A more important matter in this appeal is that the grant contained as part of its terms what has been described as a "variable royalty." The order-in-council of 1911 imports in this regard also the terms of the "old" regulations; they are called the "regulations in force on 1st September, 1909," but these are the same as the "1906 regulations" and these authorize (in the regulation of May 31, 1901 [Ex. 5] or par. 6 of the consolidating regulation of 1906 [Ex. 7]) the levy of royalties on petroleum sold "at such a rate as may from time to time be specified by Order-in-Council." It matters not in their Lordships' view whether by the years 1911-13 these regulations had been rescinded or not, or whether the Acts of 1886-1892 under which the 1906 regulations had been made, had been repealed or superseded by the 1908 *Dominion Lands Act*, or whether, while the 1906 regulations were operative, the levy of such royalties under them was to be contingent on a sale which was itself to be contingent on the discovery of petroleum in paying quantities. Under sec. 76 *(k)* of the 1908 Act the crown in right of the Dominion had in their Lordship's opinion power to deal with a case such as this by applying to it certain of the terms (those as to royalties) of a superseded regulation. This was a special case. Oil and gas had not been discovered in paying quantities but research and expenditure, attended with much benefit to the public, had been carried out and incurred by the prospectors, the predecessors in title of the respondent company. Hence they were allowed to acquire the land and rights in question without complying with any regulation (assuming one to exist) but were compelled to submit to liability in future to a royalty not prescribed by any regulation in force at the time of the grant.

Their Lordships do not consider that in dealing with such special or hard cases under sec. 76 *(k)* it was intended that the discretion of the crown should be fettered or controlled by incidents of English feudal land tenure. It had been expressly enacted that the Dominion parliament could repeal, vary or modify any English law prevailing before 1870 in territories such as Rupert's Land, and territories like Alberta which might be carved out of it. In providing as it did in sec. 76 *(k)* of the 1908 Act for a discretionary power to deal with hard or anomalous cases the legislature was, as it seems to their Lordships, arrogating to itself the right to

infringe the requirements of "free and common socage," so far as the end in view required. Where the justice of the individual case required it, it seems to their Lordships unreasonable (unless the language of the material enactments forces them to such a conclusion) to hold that the crown's liberty to deal with such cases was intended to be exercised only within the limits set by a rigid respect for the (obscure and debated) frontiers of historical socage tenure.

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If this conclusion is justified, it follows that the grant of 1913 was valid not only in other respects but in respect of the variable and prospective royalties reserved to the crown in right of the Dominion. Those rights have now been transferred to Alberta. In 1930 the "transfer agreement Acts" were passed in identical terms by the legislatures of Alberta (statutes of Alberta, 1930, ch. 21), of the Dominion (statutes of Canada, 1930, ch. 3) and of the Imperial Parliament (20 & 21 Geo. V, ch. 26). Sec. 1 of the Alberta Act [of the agreement] is as follows:

> "In order that the Province may be in the same position as the original provinces of Confederation are in virtue of section 109 of *The British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this Agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada whether paid in advance or otherwise it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this Agreement, and that the

Province shall not be liable to account to Canada for any such payment made thereafter."

Sec. 3 of the Act [of the agreement] is as follows:

"Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province."

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The right to levy a "variable" royalty on these lands was a "right" which within sec. 3 by "contract * * * or other arrangements * * * relating to any of the lands, mines, minerals or royalties" was originally reserved to the crown in right of the Dominion and by secs. 1 and 3 was in 1930 transferred from the crown in right of the Dominion to the crown in right of the province of Alberta, which accordingly was justified, through its Lieutenant-Governor in Council, in levying by the various orders-in-council of 1941-1948 (set out in par. 6 of the statement of claim) the royalties complained of by the plaintiffs-respondents in the present case.

Their Lordships therefore humbly advise Her Majesty that the appeal should be allowed and the action dismissed.

Each party must pay their costs of the proceedings throughout.

ATTORNEY-GENERAL FOR CANADA AND ANOTHER ..... APPELLANTS;

AND

HALLET & CAREY LD. AND ANOTHER .... RESPONDENTS.

J.C.* 1952 May 20.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Emergency legislation—Barley in commercial positions—Expropriation—Validity—National Emergency Transitional Powers Act, 1945 (*St. Can.* 1945, *c.* 60), *s.* 2 (1)—*Order in Council,* 1947 (*P.C.* 1292), *s.* 22.

The National Emergency Transitional Powers Act, 1945, of Canada, provides by section 2 (1): "The Governor in Council may do and authorize "such acts and things, and make from time to time such orders and "regulations, as he may, by reason of the continued existence of the "national emergency arising out of the war against Germany and Japan, "deem necessary or advisable for the purpose of— . . . (*c*) maintaining, "controlling and regulating supplies and services, prices, transportation, "use and occupation of property, rentals, employment, salaries and "wages to ensure economic stability and an orderly transition to con- "ditions of peace; . . ."

In ostensible exercise of the powers conferred by section 2 (1) of the Act of 1945, an Order in Council, P.C. 1292, was made on April 3, 1947, which provided by section 22 that "all oats and barley in com- "mercial positions in Canada," with certain specified exceptions, "are "hereby vested in the Canadian Wheat Board." The respondent, who held barley stored in various Canadian elevators, having challenged the validity of the compulsory acquisition provision of the Order in Council:—

Held, first, that it was not competent for the courts to canvass the considerations which had led the Governor in Council to deem it necessary to effect the vesting, or to ascribe to the Order in Council a purpose other than that which it professed to serve; the measures authorized were such as the Governor in Council, not the courts, deemed necessary or advisable.

Reference re Validity of Regulations in Relation to Chemicals [1943] S.C.R. 1, 12, *per* Duff C.J., applied.

Held, secondly, that the Act of 1945, by words which were neither vague nor ambiguous, on its true construction gave the Governor in Council the power to carry out what he had purported to achieve. There is no rule of construction that general words in a statute are incapable of interfering with private rights, and although the Act of 1945 did not include a specific reference to the subject of appropriation, the words "may do and authorize such acts and things, and make from "time to time such orders and regulations, as he may . . . deem necessary "or advisable" gave the amplest possible discretion in the choice of methods, and applying the paramount rule of interpretation that every statute must be expounded according to its manifest or expressed intention, there could not be implied an exclusion of any power in the circumstances to acquire compulsorily any piece of property.

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Rex v. *Halliday* [1917] A.C. 260, *Re Gray* (1918) 57 S.C.R. 150, and *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* [1947] A.C. 87, applied.

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* *Present:* VISCOUNT SIMON, LORD NORMAND, LORD RADCLIFFE, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

J.C. 1952

ATTORNEY-GENERAL FOR CANADA v. HALLET & CAREY LD.

Attorney-General v. *Wilts United Dairies Ld.* (1921) 37 T.L.R. 884 explained.

Judgment of the Supreme Court of Canada [1951] S.C.R. 81 reversed.

APPEAL (No. 32 of 1951), by special leave, from a judgment of the Supreme Court of Canada (November 20, 1950), affirming a judgment of the Court of Appeal of Manitoba (March 10, 1949), which in turn had affirmed a judgment of the Court of King's Bench (April 19, 1948), in two actions which had been heard together.

By section 2 (1) of the National Emergency Transitional Powers Act, 1945, the Governor in Council was authorized to do such things and to make such orders and regulations as he might, by reason of the continued emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of, inter alia, "Maintaining, "controlling and regulating supplies and services, prices, "transportation, use and occupation of property, rentals, "employment, salaries and wages to ensure economic "stability and an orderly transition to conditions of peace." Under the powers conferred by that Act the Governor in Council passed an Order in Council, P.C. 1292, on April 3, 1947, which, by section 22, provided that all oats and barley in commercial positions in Canada, with certain exceptions, vested in the Canadian Wheat Board.

The respondent, J. Nolan, who held 40,000 bushels of barley stored in various Canadian elevators, refused to admit that the Governor in Council had any power to make a compulsory acquisition of his barley, and the two actions out of which this appeal arose were begun. In one Nolan sought to obtain possession of the documents of title from his agents; in the other the Canadian Wheat Board sued the agents for the documents of title and the warehousemen for the barley itself.

The question was whether the Order in Council, P.C. 1292, was effective to vest in the appellants the Canadian Wheat Board the property in the 40,000 bushels of barley belonging to the respondent, and that depended on whether the power to appropriate property was given by the Act of 1945. The Court of King's Bench (Williams C.J.K.B.), the Court of Appeal of Manitoba (McPherson C.J.M., Richards, Coyne, Dysart and Adamson JJ.A.) and the Supreme Court of Canada (Rinfret C.J., Taschereau, Rand, Locke and

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Cartwright JJ., Kerwin and Estey JJ. dissenting) all answered that question in the negative.

The Attorney-General for Canada and the Canadian Wheat Board appealed.

1952. March 17, 18, 19, 20 and 24. *C. F. H. Carson Q.C., H. B. Monk Q.C., D. W. Mundell Q.C.* (all of the Canadian Bar) and *Gahan Q.C.* for the appellants. The question raised by this appeal is as to the validity of the Order in Council, P.C. 1292, made under the authority of the National Emergency Transitional Powers Act, 1945. The effect of the Order in Council was that (i) all barley in commercial positions in Canada was vested in the Wheat Board (section 22); (ii) the Wheat Board was to pay for the barley at the previous maximum price of $64\frac{3}{4}$ cents a bushel, thereby ensuring the owners a normal trading profit (section 23); and (iii) the Wheat Board was required to sell barley so vested at such prices as it considered reasonable (section 27). The Wheat Board in fact offered to resell to the former owners at the new increased selling price of 93 cents a bushel. The respondent Nolan challenged the validity of the Order in Council and instructed his agents not to deliver to the Wheat Board. The issues raised by Nolan in the two actions were (a) the constitutional validity under the British North America Act, 1867, of the Emergency Act of 1945; and (b) the validity under the Act of 1945 of the provisions of the Order in Council P.C. 1292. The constitutional validity of the Act of 1945 was not raised in the Supreme Court in the present case.

The first proposition, therefore, is that the Emergency Act of 1945 plainly conferred on the Governor in Council power to enact the provisions of the Order in Council vesting the barley in question in the Wheat Board if he deemed it necessary or advisable to do so for any of the purposes mentioned in the Act. That contention is directed to the question whether the Governor in Council had power to appropriate property, and that depends for its determination on the interpretation of the introductory words of section 2 (1) of the Act of 1945. He had power to do anything necessary or right for the purposes set out. The only limitation on the means which he may adopt is that he deems such steps necessary or advisable. It is difficult to conceive how Parliament could have conferred on the

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Governor in Council broader powers for determining what means he might adopt to achieve any of the purposes for which he was authorized to act. It has been contended by Nolan that the opening words of section 2 (1) do not authorize the appropriation of property: that contention requires those words to be interpreted to mean that the Governor in Council "may do and authorize such acts and "things . . . as he may deem necessary or advisable" except appropriate property. Section 2 (1) of course contains no such exception, and, it is submitted, there is no foundation for importing into its plain language any such exception.

Since the language is clear and unambiguous, there is no need or justification for looking outside the terms of the Act for help in interpretation: *Reg.* v. *Titterton*,[1] where it was said that "the duty of the court when called upon "to construe an Act of Parliament is . . . to read the Act "itself, and if its language is clear to give effect to what the "legislature has said. It is . . . proper to refer to earlier "Acts in pari materia only where there is ambiguity." There is none here. To read section 2 (1) as excepting the power to appropriate would in itself have the effect of making a substantial amendment, for which there is no justification. Even if it were proper to go to the War Measures Act, 1914, as an aid to interpretation of section 2 (1) of the Act of 1945, the result of a comparison between the two Acts is, it is submitted, to support our contention that the suggested curtailment of the powers of the Governor in Council cannot properly be implied. The important point is that the general words defining what means may be adopted for achieving the authorized purposes are identical in the two Acts. The emergency under the two Acts is different. In the Act of 1945 Parliament has conferred on the Governor in Council the same broad powers, and thereafter set out the enumerated purposes. The broad general power in section 3 of the War Measures Act is in no way limited by the enumerated subjects; that view finds support in *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*,[2] and see also the view of Rinfret C. J. in that case when it was before the Supreme Court.[3]

[1] [1895] 2 Q.B. 61, 67.

[2] [1947] A.C. 87.

[3] [1946] S.C.R. 248, 268, 277, 284.

Summing up on this first point: section 2 (1) of the Act of 1945 conferred on the Governor in Council in plain language powers that included power to appropriate property as a means of carrying out an authorized purpose, and such language being plain and unambiguous there is no justification for giving to it a restricted meaning, and certainly no need or justification for turning to the War Measures Act at all as an aid to interpretation. Even if that Act is resorted to as a means of interpretation, comparison of the truly comparable parts of the two Acts in the light of the decision of the Privy Council in the *Japanese* case[2] supports the submission that the power includes a power to appropriate property if the Governor in Council deems it necessary or advisable to do so for one of the prescribed purposes.

The second contention is that since, as appears from the Order in Council, the Governor in Council deemed it necessary for one of the purposes mentioned in the Act to vest the barley in the Wheat Board, it was not for the court to review the decision of the Governor in Council, there having been no bad faith on his part. It is clear from the terms of the Act that Parliament left it entirely to the Governor in Council to determine the necessity of making orders under the Act, and the Governor in Council determined that it was necessary to make the present order. In this connexion—that the court could not interfere in this respect—see *Reference re Validity of Regulations in Relation to Chemicals*[4]; *Re Gray*[5]; *Reference re Validity of Orders in Council in Relation to Persons of the Japanese Race,*[6] and the following English cases: *Rex* v. *Comptroller-General of Patents, Ex parte Bayer Products Ld.*[7]; *Point of Ayr Collieries Ld.* v. *Lloyd-George* [8]; *Carltona Ld.* v. *Commissioners of Works,*[9] and *Demetriades* v. *Glasgow Corporation.*[10] Bad faith was expressly negatived in the Court of Appeal of Manitoba. In the Supreme Court of Canada Rand J. made three conclusions which, it is submitted, give support to the order: (i) that the Governor in Council had not exceeded his authority conferred on him by the Act; (ii) that the court should not attempt to substitute its judgment for that of the Executive, and (iii) that there

[2] [1947] A.C. 87.
[4] [1943] S.C.R. 1, 12, 18.
[5] (1918) 57 S.C.R. 150, 170, 178.
[6] [1946] S.C.R. 248, 277, 284.
[7] [1941] 2 K.B. 306, 314.
[8] [1943] 2 All E.R. 546, 547.
[9] [1943] 2 All E.R. 560.
[10] [1951] 1 All E.R. 457, 460-1.

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was no bad faith on the part of the Governor in Council and he had not been guilty of misrepresenting his purpose.

There is really only one question: did the Act of 1945 give the power? If so, there would seem to be no question left because, on the authorities cited, once the Governor in Council deems it necessary, the court cannot interfere with the determination. [Reference was also made to *Powell* v. *Apollo Candle Co.*[11]]

John A. MacAulay Q.C., *G. E. Tritschler Q.C.* and *B. McGavin* (all of the Canadian Bar) for the respondent Nolan. *MacAulay Q.C.* referred to the detailed facts, to the general scheme relating to barley and to relevant evidence to indicate what, in his submission, the position was when the Order in Council was passed. It will be seen from the evidence that no documents of title were delivered to the Wheat Board, but that the holders of barley in commercial positions simply gave to the Wheat Board their cheques for the difference in price before and after March 17, 1947. Had there been a shortage of barley, it would have been expected that all the barley would have been taken over, but actually only a certain portion was taken over. No emergency existed—there was no shortage of barley in Canada on March 17, 1947. There was no evidence of supervision of sales or of directions given by the Wheat Board, with small immaterial exceptions. The real purpose, it is submitted, was not an authorized purpose of the Order in Council. The expressed purpose was for "maintaining, controlling and regulating," etc., but the real purpose was to take away certain profits which the owners of the barley would have made as the result of the increased price ceiling.

Tritschler Q.C. following. The first submission is that the Order in Council exceeds the authority granted to the Governor in Council for the reason that appropriation is not authorized by the statute. The Order in Council attempted outright expropriation of Nolan's barley, and the Transitional Powers Act conferred no power to carry out such action. The words relied on by the appellants as conferring that power are the opening words of section 2 (1) of the Act: they said that that language includes a power to appropriate property, that it is clear and unambiguous,

[11] (1885) 10 App. Cas. 282, 288, 290.

and that there is no need or justification to look outside the terms of the Act to help in interpretation. It is submitted that the words cannot be interpreted in their literal meaning, and that when interpreted in accordance with established rules of construction it becomes apparent that they do not include the right to appropriate property. It is established that words as general as these must be limited to the subject-matter which was in the mind of the legislature: Maxwell on Interpretation of Statutes, 9th ed., p. 63. What was the intention of the legislature in this case? The majority of the judges in the Supreme Court found that it was to exclude the power to appropriate property.

1952 A.C. p. 433.

One accepted method of ascertaining intention is to examine the state of the law before the statute to be construed was passed, and also the provisions of any other Act in pari materia: Maxwell, 9th ed., pp. 22 and 39. The Transitional Act and the War Measures Act are in pari materia; they both deal with different phases of the same continuing emergency arising out of the war—there are not different emergencies. From the preambles to the two Acts it appears that the powers in the Transitional Act need not be so drastic; the emergency was the same, but the power necessary to deal with the peace time conditions was much less extensive than was necessary to deal with the war. In the War Measures Act Parliament did think that it was necessary by specific words to confer power to appropriate property. That Act has been the source of the Dominion power in two wars, and it is submitted that the departure in the Transitional Act from the wording which had been previously used in the War Measures Act must be given some meaning. Parliament must be taken to have intended a result other than that which would have followed from a repetition of the pattern of the War Measures Act. As the Transitional Act contained no specific provision for appropriation and no provision for compensation, some result ought to be drawn from that, and the omission of those provisions indicates clearly that Parliament did not intend to include in the Transitional Act a right so fundamental as appropriation. Had it so intended it would have said so. A comparison of the two Acts shows that Parliament intended to withhold from the Governor in Council certain fundamental powers.

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[Counsel sought to put in the bill which became the Transitional Act, and, on objection being taken for the appellants, referred to the following cases in support of his right to do so in a constitutional case: *In re Provincial Fisheries*[12] and *Re Gray*[13]; but he was directed by the Board not to continue with that point.]

It is agreed that the general power in the War Measures Act is not limited by reference to the particularly enumerated powers. It is only limited to the more general purposes for the peace, order, etc., of Canada. Secondly, it is submitted that the general power given to the Governor in Council by the opening words of section 2 (1) of the Transitional Act is not at all in identical language with the general power in the War Measures Act—it is restricted to much narrower purposes. Thirdly, it does not follow because the enumerated particular powers of the War Measures Act do not restrict the general power that the totality of powers granted by the War Measures Act would have been as large if the enumerated powers had not been included. The general power conferred by the Transitional Act is very definitely limited by the omission from the Transitional Act of the special or particular powers of appropriation or forfeiture of property. It was said in *Re Gray*[14] that "the "specification should be deemed to be of cases in which "their might be such doubt as to whether they fell within "the ambit of the general terms—wide as they are—that "ex abundanti cautela it was safer to mention them "specifically." The powers of arrest, etc., which were in section 3 *(b)* of the War Measures Act are omitted from the Transitional Act, so why should not the power of appropriation also be taken to have been intentionally omitted.

1952 A.C. p. 434.

That the powers of the Transitional Act are not intended to include the power to appropriate property is further supported by the emphasis which is placed in the Transitional Act on the discontinuance of the emergency measures; as was said by Estey J. in the *Japanese Reference* case[15]: "Parliament did recognize that the intensity and magnitude "of the emergency had changed and diminished and under "the provisions of this Act [the Transitional Powers Act] "curtailed the extensive powers exercised by the Governor

[12] (1895) 26 S.C.R. 444.
[13] 57 S.C.R. 150, 180.
[14] 57 S.C.R. 150, 177.
[15] [1946] S.C.R. 248, 313.

"in Council under the War Measures Act." Further, statutes ought not to be construed as taking away property rights of the subject unless their language makes the intention abundantly clear: Maxwell, Interpretation of Statutes, 9th ed., p. 289; *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.*[16]; *Attorney-General* v. *Horner*,[17] and *Consett Iron Co.* v. *Clavering Trustees*.[18] Nor should statutes be interpreted as authorizing forfeiture without compensation. The answer cannot be that if the Governor in Council has deemed it necessary therefore it must be within the ambit of his power. [Reference was made to *The Japanese Reference* case[19] and to *Attorney-General* v. *Wilts United Dairies*.[20]] Unless the power to appropriate is given by clear and unambiguous words it should not be read in by implication. The act done by a person to whom it is delegated must be within the ambit of the power: *Re Gray*[21]; the *Japanese Reference* case[22]; Halsbury's Laws of England, 2nd ed., vol. 31, p. 467, and *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ld.*[23] In *Attorney-General* v. *Wilts United Dairies*[24] it was said that the powers were extensive, but that they did not go far enough to impose taxation.

1952 A.C. p. 435.

As to the appellants' contention that "it is difficult to con- "ceive how Parliament could have conferred on the Governor "in Council broader powers," one has only to look to the War Measures Act, and even the dissenting judges below agreed that there was meant to be less power in the Transitional Act. If Parliament had intended to confer the power to appropriate property it would have said so in clear and express words and put it beyond reasonable doubt. This was an impost imposed as a condition of being permitted to retain one's own property: *Les Ecclesiastiques de St. Suplice de Montreal* v. *City of Montreal*[25] and *Powell* v. *Apollo Candle Co.*[26]—the latter is not authority for the proposition that taxation can be levied by the Transitional Act.

If, however, there is power in that Act to appropriate property, the power was not being used for the purpose

[16] (1882) 7 App. Cas. 178, 188.
[17] (1884) 14 Q.B.D. 245, 256-7.
[18] [1935] 2 K.B. 42, 65.
[19] [1947] A.C. 87.
[20] (1921) 37 T.L.R. 884, 886.
[21] 57 S.C.R. 150, 157.
[22] [1947] A.C. 87, 102.
[23] [1941] S.C.R. 573, 577.
[24] (1922) 91 L.J.K.B. 897, 900.
[25] (1889) 16 S.C.R. 399, 403.
[26] 10 App. Cas 282, 286.

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stated, but for another and unauthorized purpose—to appropriate the entire barley in question under a power to regulate and control supplies and prices. The court is not bound to accept the stated purposes and may inquire fully: the *Japanese Reference* case,[27] where it was said that "the only question is whether there is apparent any matter "which justifies the judiciary in coming to the conclusion "that the power was in fact exercised for an unauthorized "purpose." That suggestion by the appellants that the court cannot inquire, coupled with the claim that the Governor in Council has unlimited power of control as necessary for this limited purpose, is a claim to absolute power, which Parliament did not in any of our statutes intend to convey, especially in the Transitional Act. The action deemed did not control and maintain and regulate supplies and prices, which was intended, and therefore the Order in Council could not be for the stated purposes, but for other purposes. It was used for the purpose of taking what the appellants called a "gratuitous profit"; that was not an authorized purpose. The Governor in Council misconceived its power. [Reference was made to *In re Price Bros. and the Board of Commerce of Canada.*[28]] Had Parliament intended to deal with the question of capturing profits it would have said so in plain words; that was a function of income tax. The courts look wherever possible for the evidence of the true purpose and real intent of the legislation: *Rex* v. *Comptroller-General of Patents*[29]; the *Price Bros.* case[30]; the *Chemicals Reference* case,[31] and *Reference as to the Validity of the Wartime Leasehold Regulations.*[32]

1952 A.C. p. 436.

English cases on "deeming" are distinguishable; they all find their authority in the Emergency Powers (Defence) Act, 1939; that Act is comparable with the War Measures Act and cannot be compared with the Transitional Act in point of strength: next, the orders were made in wartime; also it seems to have been conceded that they were within the ambit of the statute, and, of course, in none of them was there any actual taking of private property: *Point of Ayr Collieries Ld.* v. *Lloyd-George*[33]; *Carltona Ld.* v. *Commissioners of Works,*[34] and *Demetriades* v.

[27] [1947] A.C. 87, 108.
[28] (1920) 60 S.C.R. 265, 280.
[29] [1941] 2 K.B. 306, 316.
[30] 60 S.C.R. 265, 272.
[31] [1943] S.C.R. 1, 13, 23.
[32] [1950] S.C.R. 124, 141.
[33] [1943] 2 All E.R. 546, 547.
[34] [1943] 2 All E.R. 560, 564.

Glasgow Corporation.[35] It does not matter what is "deemed"; the court can still see that the power is one which falls within the power conferred by the Act. In *Liversidge* v. *Sir John Anderson*[36] there was no evidence to show that the power had been used for an unauthorized purpose; it was a war-time matter, and it was a preliminary proceeding in an action. [Reference was also made to *Green* v. *Home Secretary*[37] and to *Rex* v. *Halliday.*[38]] If it is demonstrated to the court by evidence that the real purpose is not the stated purpose, the court will take notice of that.

Next, where any Dominion legislation trenches on property and civil rights in the province it can be justified on what has been known as the emergency doctrine. The true test was laid down in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*[39]: "The general control of prop-"erty and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by "reason of the special circumstances of the national emerg-"ency which concern nothing short of the peace, order and "good government of Canada as a whole," and in a sufficiently great emergency there was power in the Dominion to deal with it for the safety of the Dominion as a whole: see also *Attorney-General for Ontario* v. *Canada Temperance Federation.*[40] The act attempted here, however, was not one which affected the interests of Canada as a whole—it did not affect the whole grain trade, and was therefore a local or private matter, and was in relation to property and civil rights in the province. If in its pith and substance this legislation was not in relation to a general emergency, but was really an interference with property and civil rights in the province, and was not justified by any emergency which affected the interests of Canada as a whole, then it cannot stand. The courts have always proceeded with caution to increase the Federal power: *Attorney-General for Ontario* v. *Attorney-General for the Dominion*[41] and *Reference re the Natural Products Marketing Act,* 1934.[42] Applying the tests in the *Fort Frances* case[43] and the *Canada Temperance* case[44] this Order in Council is not valid Dominion legislation on the

1952 A.C. p. 437.

[35] [1951] 1 All E.R. 457, 461-3.
[36] [1942] A.C. 206.
[37] [1942] A.C. 284.
[38] [1917] A.C. 260, 270-2.
[39] [1923] A.C. 695, 704.
[40] [1946] A.C. 193, 206.
[41] [1896] A.C. 348, 361.
[42] [1936] S.C.R. 398, 422.
[43] [1923] A.C. 695.
[44] [1946] A.C. 193.

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facts; it ought to be strictly interpreted and so as not to authorize the interference with fundamental rights. The judgments below ought not to be disturbed.

C. F. H. Carson Q.C. in reply. The only comparable parts of the War Measures Act and the Transitional Act are the opening words of section 3 (1) of the former and of section 2 (1) of the latter Act, and the opening words of the two are the same. The Governor in Council under either Act has the same broad powers to make such orders as he may deem necessary or advisable. Once the Governor in Council determines that something should be done for an authorized purpose then he may under either Act make whatever orders he deems necessary or advisable to serve such a purpose, and he can, it is submitted, under either Act appropriate property. [Reference was made to *Warner Quinlan Asphalt Co.* v. *The King*.[45]] Appropriation for the purposes of control would be a valid exercise of power under the general words. Deportation of British subjects was undoubtedly covered by the general words of the War Measures Act (the *Japanese Reference* case[46]), and in that case what was being dealt with, in the view of this Board, was the deprivation of the liberty of the subject. For the respondent it was said that the general words are not sufficient to give power to encroach on any fundamental rights. The War Measures Act was held wide enough to do so, and the same words in the Transitional Act should be construed in the same way in the light of the *Japanese Reference* case.[46] [Reference was also made to *Attorney-General* v. *Wilts United Dairies Ld.*[47]] The Transitional Act should be construed as capable of conferring every power falling within the words used which it is conceivable that the Governor in Council might require to use in that emergency. There is nothing in the changed character of the emergency to warrant any deduction that identical words in the two Emergency Acts should bear a different meaning.

1952 A.C. p. 438.

May 20. The judgment of their Lordships was delivered by LORD RADCLIFFE. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada dated

[45] [1924] S.C.R. 236, 245-6.
[46] [1946] S.C.R. 248, 277; [1947] A.C. 87, 101.
[47] (1921) 37 T.L.R. 884, 886; 91 L.J.K.B. 897, 900.

November 20, 1950. That judgment disposed of appeals in two separate actions which had been started in the Court of King's Bench for Manitoba, but the result of each action depends on the answer to the same question, whether an Order of the Governor General in Council, P.C. 1292, made on April 3, 1947, was effective to vest in the appellants, the Canadian Wheat Board, the property in 40,000 bushels of barley belonging to the respondent Nolan.

The three courts in Canada before which this question has come, the Court of King's Bench, the Court of Appeal for Manitoba and the Supreme Court of Canada, have all answered this question in the negative, though not always for the same reasons, and in the Supreme Court the opinions of two judges, Kerwin and Estey JJ., were in favour of the Wheat Board's claim to title. The Order in Council was made in ostensible exercise of the powers conferred on the Governor General in Council by the National Emergency Transitional Powers Act, 1945, and there can be no dispute that, if those powers included a power to acquire property compulsorily, the provisions of paragraph 22 of the Order applied to the respondent Nolan's barley and vested it in the Board. The constitutional authority of the Dominion Parliament to enact the National Emergency Transitional Powers Act, 1945 (which, for brevity, will be referred to as "the Act of 1945") is not challenged, whatever may be the true range and limit of the powers that it gives, and the whole issue, difficult and important as it is to solve, thus comes down to the problem of placing the right construction on the very general language employed by this Act of 1945.

Any consideration of the Act of 1945 must begin with a reference to the War Measures Act, 1914, which had been the main general source of emergency executive authority during the war of 1939-45. This Act is referred to in the Act of 1945, which to some extent continues the operation of its exceptional powers, and it forms a part of the legislative background against which the provisions of the later enactment must be placed. It would be legitimate, therefore, to interpret the provisions of the later Act in the light of those of the earlier one, if a comparison of the two justified any sound deduction as to the intention of Parliament as expressed in the words of the later Act. Their Lordships have had to consider in a passage of this opinion whether the particular deductions that have commended themselves

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to the Court of Appeal for Manitoba and to the majority of the judges of the Supreme Court are well founded for this purpose.

The War Measures Act conferred on the Governor General in Council very extensive authority. By section 3 it declared that he might do and authorize such acts and things, and make from time to time such orders and regulations "as he may, by reason of the existence of real or appre-"hended war, invasion or insurrection deem necessary or "advisable for the security, defence, peace, order and "welfare of Canada." The section then went on to declare "for greater certainty, but not so as to restrict the generality "of the foregoing terms," that the Governor General's powers extended to "all matters coming within the classes "of subjects" then enumerated, and there followed a list of subjects, of which "arrest, detention, exclusion and deporta-"tion" was one, and "appropriation, control, forfeiture and "disposition of property and of the use thereof" was another. Later sections prescribed that all orders and regulations made under section 3 should have the force of law, but only during war, invasion or insurrection, real or apprehended; and a section, section 7, under the heading of the fasciculus "Procedure," provided that "whenever any "property or the use thereof has been appropriated by "His Majesty under the provisions of this Act, or any "order in council, order or regulation made thereunder, "and compensation is to be made therefor and has not "been agreed upon" the claim was to be referred to and adjudicated upon in the Exchequer Court.

The Act of 1945 came into force on January 1, 1946, and one of its sections declared that on and after the same day the war against Germany and Japan should be deemed no longer to exist, so far as concerned the purposes of the War Measures Act. There was a preamble to the Act, the words of which have been much canvassed in some of the judgments delivered in the courts in Canada, and it is desirable to set out in full the contents of the preamble and of section 2 (1) which conferred new powers on the Governor in Council:—

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"Whereas the War Measures Act provides that the "Governor in Council may do and authorize such acts and "things, and make from time to time such orders and

"regulations, as he may by reason of the existence of real "or apprehended war deem necessary or advisable for the "security, defence, peace, order and welfare of Canada; "and whereas during the national emergency arising "by reason of the war against Germany and Japan measures "have been adopted under the War Measures Act for the "military requirements and security of Canada and the "maintenance of economic stability; and whereas the "national emergency arising out of the war has continued "since the unconditional surrender of Germany and Japan "and is still continuing; and whereas it is essential in the "national interest that certain transitional powers continue "to be exercisable by the Governor in Council during the "continuation of the exceptional conditions brought about "by the war and it is preferable that such transitional "powers be exercised hereafter under special authority in "that behalf conferred by Parliament instead of being "exercised under the War Measures Act; and whereas "in the existing circumstances it may be necessary that "certain acts and things done and authorized and certain "orders and regulations made under the War Measures "Act be continued in force and that it is essential that the "Governor in Council be authorized to do and authorize "such further acts and things and make such further "orders and regulations as he may deem necessary or "advisable by reason of the emergency and for the purpose "of the discontinuance, in an orderly manner as the "emergency permits, of measures adopted during and by "reason of the emergency: Therefore . . .

. . . . . .

"2.—(1) The Governor in Council may do and authorize "such acts and things, and make from time to time such "orders and regulations, as he may, by reason of the con- "tinued existence of the national emergency arising out "of the war against Germany and Japan, deem necessary "or advisable for the purpose of—

"*(a)* providing for and maintaining the armed forces of "Canada during the occupation of enemy territory and "demobilization and providing for the rehabilitation of "members thereof;

"*(b)* facilitating the readjustment of industry and "commerce to the requirements of the community in "time of peace;

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"(c) maintaining, controlling and regulating supplies "and services, prices, transportation, use and occupation "of property, rentals, employment, salaries and wages to "ensure economic stability and an orderly transition to "conditions of peace;

"(d) assisting the relief of suffering and the restoration "and distribution of essential supplies and services in any "part of His Majesty's Dominions or in foreign countries "that are in grave distress as the result of the war; or

"(e) continuing or discontinuing in an orderly manner, "as the emergency permits, measures adopted during and "by reason of the war."

One or two other provisions of the Act may be shortly referred to. Orders and regulations made under it were to have the force of law while the Act was in force: but every Order in Council was to be laid before Parliament within a short space of time after being made and was liable to be annulled by a joint resolution of both Houses, without prejudice, however, to its previous operation. There was a separate power given to the Governor in Council to continue for the duration of the Act any existing orders and regulations which had been lawfully made under the powers of the War Measures Act. Lastly, the Act was to expire on December 31, 1946, subject to extension for a further period up to one year if each House so requested by address presented to the Governor General and the Governor in Council so ordered. Thus, though the Governor in Council was given far-reaching powers, Parliamentary control over any order that he might make was retained to an extent that had not been provided for under the War Measures Act. This difference should be kept in mind when arguments are founded on a comparison between the contents of the two Acts.

Since the outbreak of war in 1939 Orders in Council had been made under the authority of the War Measures Act for the purpose of regulating and controlling certain aspects of the general economy of Canada. A Wartime Prices and Trade Board had been set up and that Board issued regulations "to provide safeguards under war conditions "against any undue enhancement in the prices of food, "fuel and other necessities of life and to insure an adequate "supply and equitable distribution of such commodities."

1952 A.C. p. 442.

(The judgment of Kerwin J. in the Supreme Court gives this summary of the position: a further statement to the same effect is contained in the judgment of Rand J.) Both oats and barley had been involved in the system of control; a maximum or ceiling price had been imposed; a floor or support price had been fixed at which the Wheat Board was to buy all oats or barley offered; and export from Canada was forbidden except under licence. On March 17, 1947, the maximum price for barley was $64\frac{3}{4}$ cents per bushel, with the support price a few cents lower. The Board had formed the decision, in accordance with the policy of the Executive Government, that these prices ought to be raised to a much higher level, since the Canadian controlled prices were much below current world prices, and acting through its powers as an administrator under the Wartime Prices and Trade Board it fixed a new maximum price for barley of 93 cents per bushel as from March 18, 1947. The authority for this new maximum was contained in a document entitled "Instructions to Trade No. 59," which was circulated to the members of the grain trade on March 17. This increase in the permitted price of barley did not stand alone. It was accompanied by a new support price based on 90 cents per bushel for No. 1 feed grade, by increases in the maximum and support prices of oats, and by the expropriation of Western Canada oats and barley "in commercial positions" at the old maximum prices ruling on March 17. The legal authority for the new support prices and the expropriation was contained in the Order of the Governor in Council, P.C. 1292, which is now in question, not in "Instructions to Trade" issued by the Board, but their Lordships do not think that any useful purpose is served by a detailed analysis of the respective dates and sources of these various measures, since there is no doubt that each formed part of a single administrative plan. Nor do they think that there is any need to deal with the legal questions involved without taking cognizance of the fact that the Government's announced purpose in making these expropriations was to "avoid the "fortuitous profits to commercial holders of oats and "barley that would otherwise result from" its action in raising the controlled prices. A copy of the government announcement formed part of Instructions to Trade No. 59, which fixed the new maximum prices; and in any event it has been referred to in so many of the judgments under review

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that it cannot but be treated as a relevant part of the case. Consistently with this purpose the Wheat Board gave to the expropriated holders an option immediately to repurchase their holdings at the higher prices, in the case of barley at 93 cents per bushel for all grades. Thus holders who decided to exercise the option could recover the ownership of their stocks at the cost of forfeiting so much potential profit as was equivalent to the difference between the old maximum price and the new: the Wheat Board acquired no more additional stocks than such as might not be taken back under the options, but realized a profit on those taken back at the rate of $28\frac{1}{4}$ cents per bushel. It was required by the Order in Council to pay this profit into the consolidated revenue fund.

Section 22 of the Order in Council provided for the expropriation. It ran as follows: "All oats and barley in "commercial positions in Canada, except such oats and "barley as were acquired by the owners thereof from the "Canadian Wheat Board or from the producers thereof "on or after the 18th day of March, 1947, are hereby "vested in the Canadian Wheat Board."

The following section required the Wheat Board to pay for the expropriated property at the old maximum price. "Oats and barley in commercial positions" were defined as meaning oats and barley which were not the property of the producer and were in store in warehouses, elevators or mills or in other storage or transportation facilities. The terms "oats" and "barley" were themselves confined to oats and barley grown in Western Canada.

The respondent Nolan was an owner of barley affected by this provision. He had been holding 40,000 bushels since 1943. The barley was stored in various Canadian elevators, and warehouse receipts covering it were in the hands of his agents, the respondents Hallett & Carey Ld. From the first he refused to admit that the Governor in Council had any power to make a compulsory acquisition of his barley, and the two actions with which this appeal is concerned are the consequence. In one he seeks to obtain possession of the documents of title from his agents; in the other the Wheat Board is suing the agents for the documents of title and the warehousemen for the barley itself. During the course of proceedings the barley was sold under the directions of the court, and the dispute

now turns on the question which party is entitled to receive the moneys that represent its proceeds. The respondents Hallett & Carey Ld. have not been represented in the appeal before their Lordships.

The validity of the vesting provision of the Order in Council has been attacked on several grounds. It has been said that its "real" purpose was not to carry out any of the purposes specified in the Act of 1945 but to confiscate the profits that would otherwise have been made by a certain class of owners of barley or to exact an impost from them. It has been said that the order was not in fact necessary for or related to any of the purposes of the Act and was therefore not a valid exercise of any of the powers which the Act conferred. It has been said that the order was invalid because it discriminated against some out of the whole body of citizens or of barley owners and that the authority given by the Act did not extend to the making of such discrimination. All these are views that found favour with one or more of the members of the Court of Appeal for Manitoba, and they constitute a different class of objection from those which are more properly related to the construction of the enabling Act itself, for, however expressed, they are in reality an attempt by the court to take over into its own hands the functions which have been entrusted by Parliament to the Governor in Council. This is, in their Lordships' view, an inadmissible proceeding.

The orders that are valid under the Act are such orders as the Governor in Council may by reason of the continued existence of the emergency deem necessary or advisable for any of the specified purposes. The preamble of this order states that it is necessary by reason of the continued existence of the emergency to effect the vesting in the Wheat Board of such holdings as are now in question "for the "purpose of maintaining, controlling and regulating supplies "and prices, to ensure economic stability and an orderly "transition to conditions of peace." How, then, can a court of law decide that the vesting was for another and extraneous purpose or hold that what the Governor in Council has declared to be necessary is not in fact necessary for the purposes he has stated? There is no warrant at all for presenting this as a case in which powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden.

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If bad faith of that kind can be established, a court of law may intervene: see, for instance, *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ld.*[48] To speak of the "real purpose" of this order as being that of confiscating profits is to confuse means with ends, for the true question is whether it can be said that the Governor in Council could not have deemed it necessary to take this step as a means incidental to the realization of the purposes stated in this order. Clearly he could. Government authority which had hitherto depressed, was now to raise prices, and those responsible might well feel that they must accompany this action with a requisition of some of the profits that they thus created. Nor is this a case in which the order shows on the face of it a misconstruction of the enabling Act or a failure to comply with the conditions which that Act has prescribed for the exercise of its powers. On the contrary, the order shows on its face compliance with those conditions, and the problem considered by Clauson L.J. in *Rex* v. *Comptroller-General of Patents*[49] and by Duff C.J. in *Reference as to the Validity of Certain Chemical Regulations*[50] is not therefore a present problem. This is an order which not only recites that the Governor in Council regards the making of it as necessary for authorized purposes, but which in terms invokes the powers conferred on him by the Act of 1945. An order so expressed leaves no ground for a judicial inquiry whether the Governor can have intended to exercise those powers, a kind of inquiry which a court has sometimes found itself called on to make in a case where the instrument impugned is itself ambiguous: see, for instance, *In re Price Bros. & Co. and the Board of Commerce of Canada.*[51] In the circumstances prevailing here their Lordships are satisfied that the true answer to any invitation to the court to investigate the Order in Council on its merits or to ascribe to it a purpose other than that which it professes to serve is given in the words of Duff C.J. in the *Reference re Chemical Regulations*: "I cannot agree that it is competent to any court to canvass "the considerations which have, or may have, led him to "deem such regulations necessary or advisable for the "transcendent objects set forth. . . . The words are too "plain for dispute: the measures authorized are such as the

[48] [1941] S.C.R. 573.
[49] [1941] 2 K.B. 306, 316.
[50] [1943] S.C.R. 1, 13.
[51] 60 S.C.R. 265.

"Governor General in Council (not the courts) deems "necessary or advisable."[52]

If, then, the expropriation which the Order in Council prescribes is to be held invalid in law it must be attacked by showing that the Act of 1945, truly interpreted, did not give the Governor the power to carry out what he has purported to achieve. No other line of attack is open. Very wide general considerations have been brought to bear on this question of interpretation and have been held to limit the range of powers that the Act confers. For instance, the trial judge in Manitoba interpreted the Act as allowing only the continuance of existing powers and as authorizing nothing more to be done than what could be described as "the discontinuance of measures adopted "during and by reason of the emergency." So, too, the Chief Justice in the Court of Appeal: "In no portion of the Act was "there any power given to extend the controls." This imposes a construction that flies in the face of the words of the Act. It was not merely an Act to empower the Governor to continue measures already taken or to undo things already done. It was an Act that recognized that the emergency engendered by the war had brought about a situation in which new purposes might have to be served by new lines of executive action. There were the new problems of the post-war occupation of enemy territory, of the readjustment of men and of industry and commerce to peace-time needs, of securing economic stability in the fluctuating disorders of a post-war world, of restoring and distributing essential supplies in countries overseas that had been left in grave distress by the events of war. The Act itself recites explicitly ". . . whereas in the existing "circumstances it may be necessary that certain acts and "things done and authorized and certain orders and regula- "tions made under the War Measures Act be continued in "force and that it is essential that the Governor in Council "be authorized to do and authorize such further acts and "things and make such further orders and regulations as "he may deem necessary or advisable by reason of the "emergency and for the purpose of the discontinuance, "in an orderly manner as the emergency permits, of "measures adopted during and by reason of the emergency." Plainly, within the scope of its wide range of purposes, the

[52] [1943] S.C.R. 1, 12.

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Act is conceived in the most fluid and general terms, conferring deliberately the most extensive discretion. To import into such a measure a precise limitation (if so vague a phrase can itself be said to be precise) that no action can be taken that "extends" a particular control of a particular commodity is, in their Lordships' view, a radical misunderstanding of the true nature of such legislation.

Nor can they give support to another general proposition about the Act of 1945 that has found favour with some of the members of the Supreme Court. This Act, it is said, amounts to a curtailment of the powers that the Governor in Council could exercise during the war under the War Measures Act. It involves an immediate "reduction" of those powers. From this it is argued that, since the War Measures Act, in providing specifically for expropriation, provided also a procedure for judicial assessment of compensation, it is not to be supposed that its successor, which makes no reference either to expropriation or to compensation, has conveyed what would be the more extensive power of effecting an expropriation without compensation. Their Lordships think that a fallacy is involved in submitting the Act of 1945 to a measuring rod of this kind. Whether compensation is really a necessary condition of expropriation if made under the War Measures Act must be regarded as itself an open point: it is at least certain that section 7 does not expressly make it so, for it does no more than enact the procedure to be followed when "property . . . has been appropriated . . . and compensation "is to be made therefor." But, that apart, comparisons between the War Measures Act and the Act of 1945 are bound to go astray unless, in making them, a clear distinction is observed between "purposes" and "powers." The purposes for which powers may be exercised under the later Act are undoubtedly different from the purposes that are to be pursued under the earlier Act. In that, they are nothing less than "the security, defence, peace, order and "welfare of Canada"; in this, they are the various sets of purposes enumerated in heads *(a)* to *(e)* of section 2 (1). In that, the Governor may act in pursuit of those purposes "by reason of the existence of real or apprehended war, "invasion, or insurrection"; in this, his action is to be "by reason of the continued existence of the national "emergency arising out of the war against Germany and

1952 A.C. p. 447.

"Japan." If it led to any relevant conclusion it might well be said that the purposes to be served under the War Measures Act are "wider" than those to be served under the Act of 1945. It would still be true that the latter are vast and sweeping and relate to an emergency that threatens the national life. But the question is not which is the wider set of purposes but whether a kind of action that is expressly permitted in pursuit of "war" purposes is impliedly excluded when the post-war purposes are to be attained. No real light is thrown on this by contrasting the respective widths of the two ranges of purpose, when each is inherently so wide. All that can be noted is that the things that may be done in pursuit of the permitted purpose are covered by the same words in each Act: the Governor in Council "may do and authorize such acts and things, "and make from time to time such orders and regulations "as he may . . . deem necessary or advisable." They are words that give him the amplest possible discretion in the choice of method.

1952 A.C. p. 448.

This distinction between purposes and powers in the analysis of the two Acts prevents their Lordships from drawing any useful deduction from the fact that the later Act does not reproduce the declaration to be found in the earlier Act that the powers of the Governor are to extend to certain classes of subjects, of which class (*f*) is "Appro- "priation, control, forfeiture and disposition of property "and of the use thereof." The fact that the later Act did not include any such specific reference to the subject of appropriation may be said to have formed the determining element in the majority opinion of the Supreme Court. Taschereau J. speaks of the power to appropriate property as having been "deleted" from the Act of 1945 and deduces that it was the clear intention of Parliament that such powers were not to exist in the future. The Chief Justice, Rand and Cartwright JJ. make what is in effect the same deduction. But their Lordships think it clear that there is too much difference between the structures of the two Acts for any valid deduction of this sort to be made. Purposes can be compared with purposes; but these sub-heads (*a*) to (*f*) of section 3 of the War Measures Act are not purposes, and it is misleading to contrast their contents with the contents of sub-heads (*a*) to (*e*) of section 2 (1) of the Act of 1945 and then to conclude that, because expropriation

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is not included among the purposes listed in those sub-heads (*a*) to (*e*), it is not a power covered by the Governor's authority to do whatever he deems necessary or advisable for those purposes. Sub-head (*c*) does indeed include among the subjects that may be maintained, controlled or regulated "use and occupation of property, rentals"; but no one would suggest that the ownership of property in general has been made a subject for control or regulation. What is suggested is that the maintenance, control and regulation of these subjects that are mentioned in this sub-head may very well involve or necessitate the act of acquiring or changing the ownership of some piece of property. To take a single instance among many that might be offered: if supplies may have to be maintained, controlled or regulated, is it reasonable to suppose that the power to acquire any property compulsorily is impliedly withheld? So to hold would threaten the very basis of the Act. Their Lordships think that there is not by now any room for doubt as to the function performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done: they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them (see *Re Gray*[53]; *Ref. as to Validity of Orders in Council re Persons of Japanese Race*[54]). What they do is to state explicitly certain things that are to be treated as falling within the range of the general powers already conferred. In that sense alone they extend, because they amplify, those powers. But the Act of 1945 makes no such declaration and offers no such list. It leaves the general powers that it confers unexplained by statutory definition. It is not as if it made some new declaration and offered some new list, the form of which might appropriately be compared with the form adopted by its predecessor. In such a case changes might indeed be significant. But where, as here, one term of the comparison is lacking altogether there is no firm ground for the inferences that have been drawn as to the intention of the later Act.

1952 A.C. p. 449.

[53] 57 S.C.R. 150.

[54] [1946] S.C.R. 248, 269; [1947] A.C. 87, 165.

In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object. There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention. If the Act of 1945 is approached in this way, it is very difficult to see what warrant there is for introducing into it by way of interpretation an implied exclusion of any power in any circumstances to acquire compulsorily any piece of property. For, unless compulsory acquisition is absolutely excluded from the range of things that the Governor may do, any particular exercise of the power is a matter for his discretion and cannot come within the control of the court.

Yet this is an enactment framed for the purpose of meeting an emergency that imperils the national life: it authorizes action over the whole economic field and extends to purposes outside the territory of Canada itself; it embraces purposes such as the maintenance, control and regulation of supplies, prices, transportation, the use and occupation of property, rentals, employment, salaries and wages, which have no meaning if they do not involve a deliberate and consistent interference with private rights, including private rights of property. And the power of the Executive to pursue these purposes, while the national emergency continues, is conferred by Parliament without express reservation and in the amplest terms that statutory language can employ. There is nothing in the purposes themselves that makes it unlikely or unreasonable that expropriation would ever have to be resorted to. It might be said more truly that some of the purposes are such that expropriation would be a likely incident of their realization. Yet, if the argument for the respondent Nolan is right, it is the duty of the court to introduce into the Act a saving that absolutely excludes this particular form of action. Their Lordships have found it impossible so to interpret the Act.

1952 A.C. p. 450.

It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to

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achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related. Nor can a court pause in doubt over the question whether this is an Act by which it is intended to authorize interference with private rights: such subjects as supplies, prices, rentals and wages cannot be controlled without interference on the largest scale. If rights so historic as a man's right to sell his labour where and at what price he pleases or a man's right to use his own property in his own way are avowedly placed under the Governor in Council as subjects of control and regulation, what peculiar sanctity can the law give to the ownership of consumable goods, so that this particular form of private right is to be exempt from any action in pursuit of the authorized purposes? Certainly there is no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so. The general words of the Defence of the Realm (Consolidation) Act, 1914, of the United Kingdom were adequate to authorize the internment, without trial, of Mr. Zadig (*Rex* v. *Halliday*[55]). The general words of the War Measures Act were adequate to authorize the conscription of Mr. Gray for military service (*In re Gray*[56]); or to authorize the deportation of British subjects and

1952 A.C. p. 451.

[55] [1917] A.C. 260

[56] 57 S.C.R. 150.

deprivation of their citizenship, without trial (*in re Japanese Reference*[57]). On the other hand, in *Attorney-General* v. *Wilts United Dairies Ld.*[58] the House of Lords refused to hold that the Food Controller, acting under the emergency legislation of the 1914-1918 war, had authority to impose as a condition of the taking of licences a charge which amounted to the levying of a tax. It is not clear from the abbreviated report that is available whether it would have taken the same view had there existed a defence regulation made under the Defence of the Realm Act expressly authorizing the imposition of such a charge. What is clear is that the decisions both of the Court of Appeal and of the House of Lords in that case were much influenced by their knowledge of the history of the Parliamentary struggle to prevent the levying or distribution of taxes without the express sanction of Parliament, and they were disposed to interpret the Food Controller's powers in the light of that history. But having regard to the other cases just referred to it would be impossible to extract from the decision in the *Wilts United Dairies* case[58] any general principle of construction that made general words in a statute incapable of authorizing the gravest possible inroads upon private rights. And, unless there is such a principle, their Lordships can find no sufficient ground for importing into the Act now under consideration an exception of the power to acquire compulsorily the absolute title to property.

For these reasons their Lordships will humbly advise Her Majesty that these appeals should be allowed and that the orders of the Supreme Court, the Court of Appeal of Manitoba and the Court of King's Bench of Manitoba in both actions should be set aside, except so far as they respectively deal with the costs of those actions and of the appeals therein; in lieu of the orders so set aside there should be judgment dismissing the action commenced by the respondent Nolan, and in the action commenced by the Board judgment should be entered for it against that respondent in the amount of the moneys remaining in court; the actions should be remitted to the Court of Appeal and the Court of Queen's Bench of Manitoba for an order for the payment out to the Wheat Board of the moneys remaining in court to the joint credit of the actions. Their Lordships' humble advice to Her Majesty that the

1952 A.C. p. 452.

[57] [1947] A.C. 87.

[58] 37 T.L.R. 884.

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orders as to the costs of the proceedings in Canada should be left undisturbed is in accordance with the terms on which the appellants were placed when they obtained special leave to appeal. In further pursuance of those terms the appellants will pay the costs of the respondent Nolan of this appeal.

Solicitors: *Charles Russell & Co.*; *Lawrence Jones & Co.*

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS ..... APPELLANTS;

AND

ISRAEL WINNER (DOING BUSINESS UNDER THE NAME AND STYLE OF MACKENZIE COACH LINES) AND OTHERS ..... RESPONDENTS.

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Feb. 22.
1954 A.C. p. 541.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—New Brunswick—Constitutional law—Provincial highways—Inter-provincial public motor bus service—Licensing—Subject to exclusive Dominion legislative competence—Dominion power not impaired by provincial regulatory powers of control over its highways—Inter-provincial undertaking one and indivisible—Consequential power to carry purely intra-provincial passengers—"Works and undertakings"—To be read disjunctively—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92 (10) *(a)—Motor Carrier Act*, 1937 (*New Brunswick*) (*c. 43*) (*as amended*), *ss. 4, 11, 17.*

1954 A.C. p. 542.

Statute—Dominion—Validity. "Works and undertakings."

By section 92 of the British North America Act, 1867: "In each "province the legislature may exclusively make laws in relation to "matters coming within the classes of subjects next hereinafter enumer-"ated; that is to say:—. . . (10 Local works and undertakings, other "than such as are of the following classes:—(*a*) Lines of steam or other "ships, railways, canals, telegraphs, and other works and undertakings "connecting the province with any other or others of the provinces, or "extending beyond the limits of the province: . . ."

The words "works and undertakings" in section 92 (10) (*a*) of the British North America Act, 1867, are to be read disjunctively, so that if either "works" or "undertakings" connect the province with others or extend beyond its limits the Dominion Parliament alone is empowered to legislate in respect of them, for that legislature has the same jurisdiction over the excepted matters specified in subsection (10) (*a*), (*b*) and (*c*) as it would have enjoyed if the exceptions were in terms inserted in one of the classes of subjects assigned to it under section 91 of the Act of 1867. Accordingly, where the Motor Carrier Board constituted under the Motor Carrier Act, 1937, of New Brunswick had granted a licence to the respondent, a resident of the United States of America, authorizing him to operate public motor buses from Boston, Massachusetts, through the province of New Brunswick on specified highways to Glace Bay in the province of Nova Scotia and return, "but not to embus or debus passengers in the province of New Brunswick," it was not within the legislative powers of the province of New Brunswick by the Act of 1937 or regulations made thereunder, or within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the respondent from carrying passengers from points outside the province of New Brunswick to points within the province and vice versa.

In re the Regulation and Control of Radio Communication in Canada [1932] A.C. 304, 315; 48 T.L.R. 235 applied.

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* *Present*: LORD PORTER, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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City of Montreal v. *Montreal Street Railway* [1912] A.C. 333, at p. 342; 28 T.L.R. 220 considered.

Further, while the province admittedly made, maintained, controlled and regulated the use of the roads within the province, and had authority over them to that extent, nevertheless in the case of inter-provincial undertakings connecting one province with another and extending beyond the limits of the province the jurisdiction of the Dominion under section 92 (10) (*a*) could not be impaired by the province's general right of control over its own roads. So to construe section 92 (10) (*a*) would destroy the efficacy of the exception. Here the Motor Carrier Act or the licence or both combined had the effect of sterilizing the functions and activities of the respondent's undertaking in its task of connecting New Brunswick with both the United States of America and with the province of Nova Scotia, and were an interference with the prerogative of the Dominion. Whatever provisions or regulations a province might prescribe with regard to its roads, it must not prevent or restrict inter-provincial traffic; that did not in any way prevent what was in essence traffic regulation, but the provisions in the local statutes and regulations must be confined to such matters. In the present case they were not so confined, for the pith and substance of the provisions in question was not traffic regulation, but an interference with an undertaking connecting province and province, and therefore an incursion into the field reserved by the British North America Act to the Dominion.

Colonial Building and Investment Association v. *Attorney-General for Quebec* (1883) 9 App. Cas. 157; *Great West Saddlery Co. Ld.* v. *The King* [1921] 2 A.C. 91; 37 T.L.R. 436; and *Lymburn* v. *Mayland* [1932] A.C. 318; 48 T.L.R. 231 considered.

Lastly, the respondent was not engaged in two enterprises, one within the province and the other of a connecting nature; his undertaking was in fact one and indivisible—an inter-connecting undertaking extending beyond the limits of the province, and therefore solely within Dominion jurisdiction under section 92 (10) (*a*)—and the respondent could not be prohibited, as part of that one undertaking, from taking up and setting down passengers whose journey both began and ended within the province. Whether there was an inter-connecting undertaking depended upon all the circumstances of the case.

Toronto Corporation v. *Bell Telephone Company of Canada* [1905] A.C. 52, 59; 21 T.L.R. 45 applied.

The words "other than such" in section 92 (10) of the British North America Act, 1867, do not mean "other than such *local* works and undertakings as are within the exceptions," but merely mean such works and undertakings as are within the categories thereafter set out.

Judgment of the Supreme Court of Canada [1951] S.C.R. 887 affirmed in part and reversed in part.

CONSOLIDATED APPEALS (No. 23 of 1952), by special leave, from a judgment of the Supreme Court of Canada (October 22, 1951), reversing a judgment of the Supreme Court of New Brunswick, Appellate Division (May 1, 1950), answering questions raised for the opinion of the court by order of Hughes J. in the Supreme Court of New Brunswick, Chancery Division (January 17, 1950).

The following introductory statement is taken from the judgment of the Judicial Committee: The problem with

which the Board were confronted in the present appeal was concerned with the conflicting jurisdiction of the Parliament of Canada on the one part, and on the other part of the legislation and regulations of the province of New Brunswick made under its local Acts.

The parties immediately concerned were originally (1), as defendant, one Winner who resided in the United States of America and was in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or payment from Boston through the State of Maine and the province of New Brunswick to Glace Bay in the province of Nova Scotia and intermediately, and (2) as plaintiff, the respondent S. M. T. (Eastern) Ld., which held licences granted by the Motor Carrier Board of the province of New Brunswick to operate motor buses for hire or payment over certain highways, which need not be further specified, between St. Stephen and the City of St. John, both in New Brunswick.

In substance the plaintiff's claim was for an injunction against the defendant restraining him from embussing and debussing (taking up or setting down) passengers within the province of New Brunswick, and a declaration that he had no right to do so.

In his defence the defendant stated that he had in fact embussed and debussed passengers in the province and that he intended to continue doing so unless and until some court of competent jurisdiction should declare that he was legally debarred therefrom.

Upon these contentions Hughes J. of the Chancery Division of the Supreme Court of New Brunswick gave no decision, but propounded certain questions of law to be raised for the opinion of the Supreme Court of New Brunswick, Appellate Division. He further ordered that, for the purpose of that opinion, the facts relevant to the issues to be determined should be deemed to be those set out in his order. Those essential to the matter now in question were as follows:—

1. The plaintiff was a company incorporated under and by virtue of the New Brunswick Companies Act and was in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the province of New Brunswick.

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2. The plaintiff held licences granted by the Motor Carrier Board of the province of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the City of St. John, New Brunswick, over Highway Route No. 1, and between the City of St. John and the Nova Scotia border over Highway Route No. 2, for the purpose of carrying passengers and goods for hire or compensation.

3. The plaintiff by its public motor buses maintained a daily passenger service over the routes set out in paragraph 2 hereof.

5.—(a) On June 17, 1949, on the application of the defendant the Motor Carrier Board granted a licence to the defendant, permitting him to operate public motor buses from Boston in the Commonwealth of Massachusetts through the province of New Brunswick on Highways Nos. 1 and 2 to Halifax and Glace Bay in the province of Nova Scotia and return, but not to embus or debus passengers in the province of New Brunswick after August 1, 1949. (b) At the time of making the application, the defendant challenged the validity of 13 George VI, chapter 47 (1949), and the Motor Carrier Act, 1937, as affected thereby, as being ultra vires of the legislature of the province of New Brunswick. (c) The Motor Carrier Board made no specific ruling on the defendant's challenge as set out in sub-paragraph (b), but acted under 13 George VI, chapter 47 (1949).

6. The defendant by his motor buses maintained a regular passenger service over the routes set out in paragraph 5 (a) hereof.

7. Since August 1, 1949, the defendant had continually embussed and debussed passengers within the province of New Brunswick and it was his intention to continue to do so unless and until it should have been declared by some court of competent jurisdiction that such operations were prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

8. The defendant intended to carry passengers not only from points without the province of New Brunswick to points within the said province and vice versa, but also, in connexion with and incidental to his operations as more particularly described in paragraph (9) hereof, to carry passengers from points within the said province to destinations also within the said province, unless and until it

should have been declared by some court of competent jurisdiction that such operations were prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

9.—(a) The business and undertaking of the defendant consisted of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the city of Boston in the Commonwealth of Massachusetts and the town of Glace Bay in the province of Nova Scotia and between intermediate points. (b) The business and undertaking was conducted by the defendant over that portion of its route which lay between the city of Boston and the town of Calais, Maine, under a certificate granted by Interstate Commerce Commission (a Federal commission of the United States of America having jurisdiction, inter alia, over inter-state transportation).

(d) The Motor Carrier Board of the province of New Brunswick, on June 17, 1949, on the application of the defendant as set forth in paragraph 5 hereof, purported to licence the operation of the defendant, in the province of New Brunswick, as follows:

"Israel Winner doing business under the name and style "of 'MacKenzie Coach Lines,' at Lewiston in the State of "Maine is granted a licence to operate public motor buses "from Boston in the State of Massachusetts, through the "province of New Brunswick on Highways Nos. 1 and 2, "to Halifax and Glace Bay in the province of Nova Scotia "and return, but not to embus or debus passengers in the "province of New Brunswick after August 1, 1949."

(e) The Board of Commissioners of Public Utilities for the province of Nova Scotia had purported to approve the defendant's operations in the province of Nova Scotia over the following routes: "(a) New Brunswick border to Glace "Bay, via Route No. 4—Wentworth Valley and Truro, "302 miles; (b) New Brunswick border to Glace Bay, via "Route No. 2—Parrsboro and Truro, 319 miles; (c) New "Brunswick border to Glace Bay, via Route No. 6—Pug-"wash, Wallace, Pictou and New Glasgow, 292 miles; "(d) Truro to Halifax, 64 miles (3 miles of which is within "the corporate limits of the town of Truro and city of "Halifax)."

(f) Subsequently the Board of Commissioners of Public Utilities for the province of Nova Scotia amended the certi-

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ficate granted to the defendant as set out in sub-paragraph (e) hereof as follows: "Operation of this route is permitted "To BE SUSPENDED from January 12, 1949, until May 1, "1949."

(g) The defendant, in fact, operated as a public motor carrier between the city of Boston aforesaid, the town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, a copy of which was hereunto annexed marked "A," between May 1 and December 15 in each year, the period of time covered by the certificates granted by the Interstate Commerce Commission.

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(j) Incidentally to its operations as aforesaid, the defendant proposed to pick up, within the province of New Brunswick, passengers and their baggage having a destination also within the province of New Brunswick.

The questions for the opinion of the Supreme Court of New Brunswick were: "(1) Are the operations or proposed "operations of the defendant within the province of New "Brunswick, or any part or parts thereof as above set "forth, prohibited or in any way affected by the provisions "of the Motor Carrier Act, 1937, and amendments thereto, "or orders made by the said Carrier Board? (2) Is 13 "Geo. VI, chapter 47 (1949), intra vires of the legislature "of the province of New Brunswick?"

To those questions there was by agreement between the parties added what may be described as an enlargement of the first question, but may, perhaps, be more conveniently dealt with (as it was dealt with in the Supreme Court of New Brunswick) as forming a third question, viz.: "(3) Are "the proposed operations prohibited or in any way affected "by regulation 13 of the Motor Vehicle Act, chapter 20 "of the Acts of 1934, and amendments, or under sections "6 or 53 or any other sections of the Motor Vehicle Act?"

The Supreme Court of New Brunswick, Appeal Division (Richards C.J., Harrison and Hughes JJ.) answered all the questions in the affirmative.

On appeal to the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.) it was held by that court that, apart from intra-provincial traffic, the defendant's undertaking was excepted under section 92 (10) (*a*) of the British North America Act, 1867, from provincial legislative jurisdiction.

The Attorney-General for Ontario and others now appealed, and the defendant cross-appealed against the decision of the Supreme Court respecting the intra-provincial traffic.

1953. Nov. 4, 5, 9, 10, 11, 12, 16, 17 and 18. *Dana Porter Q.C.* (A.-G. for Ontario) and *C. R. Magone Q.C.* for the Attorney-General for Ontario, appellant. This appellant appeals against that part of the judgment of the Supreme Court which held that, apart from intra-provincial traffic, the defendant's undertaking was excepted under section 92 (10) (*a*) of the British North America Act, 1867, from provincial legislative competence. It is submitted that section 92 (10) (*a*) does not apply to this particular enterprise. There never has been any question that the province can control its highways; the real question is where is the dividing line to be drawn between legislation which relates to the control of highway traffic and legislation which in its pith and substance may relate to some undertaking or business which is not within the jurisdiction of the province. It is the provincial licence which gives Winner the right to use the highways. Throughout its history the province has had control of the highways, and the legislation here in question is, it is submitted, highway legislation. It is part of the whole policy and scheme which is to be found in every modern State that it has the power of dealing with traffic and roads. In New Brunswick, in Canada, and in Great Britain under the Road Traffic Acts, there is the same type of legislation, and the same policy expressed in different words. The surface of the highway is built by revenues raised by the provincial legislatures. If there is to be control, there must be the power to exclude certain types of vehicle or to limit the form of traffic.

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There are three main propositions. First, whether or not Winner's operation is an undertaking within the meaning of section 92 (10) (*a*), it is contended that, by virtue of the powers of the province to control provincial highways and the traffic on them, the Motor Carrier Board had the power to grant or to refuse a licence to Winner. Neither the licence issued to him nor the condition attached to it was an attempt to regulate his business; it simply laid down conditions on which he might have the right to pass on the highways of New Brunswick. It really comes down to this: to what extent had the province a right to limit the right of passage on its own highways, paid for and made by it, and if it has

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not such right, who has? If the board had power to refuse a licence, then, it is submitted, it had power to attach any condition.

Secondly, whether or not Winner's business is an "undertaking," the provincial jurisdiction over the highways extends not only to the licensing of operations but to the regulation of those operations in all aspects. The power to regulate operations on the highways is in its pith and substance provincial. That power is also necessarily incidental to the control of the highways. Thirdly, Winner's business was not an "undertaking" or "a work and undertaking" within the exception meaning in section 92 (10) (*a*). The word "local" must be given some significance; there must be a locus. Those are the three main propositions.

With regard to the first proposition, the Motor Carrier Act related entirely and exclusively to operations within the province. There is no such thing in Canada as an inter-provincial highway—every highway system is self-contained within the province. *Provincial Secretary of Prince Edward Island* v. *Egan*[1] is the most important case dealing generally with the question of provincial control of highways. So, generally speaking, highway traffic legislation is undoubtedly within provincial jurisdiction, and the question whether the Motor Carrier Act is within that class of legislation is something which has to be considered in light of the policies which have been adopted in legislation throughout the civilized world to deal with this type of problem: Road Traffic Act, 1930, s. 72 (Great Britain). The principle is the same in all this class of legislation which provides for the discretionary type of franchise licence in respect of motor-bus operations. The pith and substance of that general legislation is to provide for the control and use of the highways irrespective of what the origin of the people who seek to use them may be. Under that legislation the board has the power to deny a licence to any person who seeks to operate within the province even though he comes from outside. If, indeed, an operator wished to start his operations outside the boundaries of the province and could not be prevented under this Act from coming in and from using the highways, he would be in a higher position than operators who are entirely within the province. That would appear to be an anomalous situation.

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[1] [1941] S.C.R. 396, 400-2.

There is nothing in section 92 (10) (*a*) which gives any right to the use of the highways. In this case there is no undertaking which connects anything until it gets the right to use highways. What has to be determined is what right did Winner have to operate on the highways of New Brunswick other than the right which was given to him under the legislation of that province. The pith and substance of this legislation is not directed to inter-provincial undertakings, but might only incidentally affect certain inter-provincial undertakings; that is the view which should prevail. *Ladore* v. *Bennett*[2] goes a long way to support the contention that while the legislation here in question may incidentally affect some possible inter-provincial operation, its pith and substance is to restrict and develop operations on the highways of New Brunswick. Winner's licence was subject to a condition that he could operate on those highways a through service. The licence and the condition are bound together and, if the latter is bad, then he had no licence at all and had no right to go on the highways. The province cannot give by its legislation rights which the province cannot control and destroy. [Reference was made to *Great West Saddlery Co.* v. *The King*,[3] *Colonial Building and Investment Association* v. *Attorney-General of Quebec*[4] and *Lymburn* v. *Mayland*.[5]]

1954 A.C. p. 550.

One comes back to the question whether the right of passage can be restricted and limited by the provincial legislature. There is no public common law right of passage over provincial highways applying to citizens throughout the length and breadth of Canada which extends beyond the powers of the provincial legislature. Where a provincial highway is created by statute, then the rights which flow from that creation may be limited or dealt with in any way by the legislative body which creates those rights and which is entirely sovereign within its jurisdiction. The Motor Carrier Act is provincial in its scope and purpose, and is in its terms entirely within the jurisdiction of the province to pass, so that if there is any possible way in which the Federal Parliament might conceivably act under section 92 (10) (*a*) as an incidental effect, that is a matter with which the province is not really concerned. In Quebec there never was

[2] [1939] A.C. 468; 55 T.L.R. 732.
[3] [1921] 2 A.C. 91; 37 T.L.R. 436.
[4] (1883) 9 App. Cas. 157, 166.
[5] [1932] A.C. 318, 324; 48 T.L.R. 231.

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any common law as regards public right of passage on a highway similar to the common law of England; so there cannot be any general common law right in Canada if one province is left out, and it must be general if it is to be the common law. Before confederation the highways belonged to the Crown, and the public entered them not as of right but at the pleasure of the Crown.

With respect to the suggestion that certain rights flow from citizenship itself, what the Supreme Court appears to have overlooked in dealing with the rights which flow from citizenship is the federal character of the union; and there are certain types of civil rights, except those which are expressly excluded, which are dealt with entirely by the provinces. Canada is no less one Dominion merely because there is a division of powers. The argument based on citizenship on the facts of this case seems to be somewhat far removed from the issue. [Reference was made to *Hydro-Electric Power Commission of Ontario* v. *County of Grey*.[6]] It was decided in *City of Montreal* v. *Montreal Street Railway*[7] that there should not be, could not be, and was not, any dual control of the traffic on the provincial railway. In that case through traffic which went over a provincial line was dealt with; the present case is concerned with through traffic going over a provincial highway, and it is submitted that if the judgment in the *Montreal Street Railway* case[7] was right as to the facts, then a fortiori in the present case, dealing with a highway which is provincial in its inception, controlled by provincial legislation, laid down under provincial legislation, maintained by provincial funds, paid for out of the revenues derived from the province, any through traffic which goes over that highway is subject to the provincial jurisidiction just as it was in the railway case.

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If the province has the right to provide for licences of the kind in question here, discretionary licences as to the use of the highways, then, if the authority set up under the Act has power to attach or specify conditions in any such licence, it really does not matter whether the condition itself deals with some matter which could not properly be dealt with by provincial legislation: an analogous authority on this point is *Brooks-Bidlake and Whittall Ld.* v. *Attorney-General*

[6] (1924) 55 O.L.R. 339.

[7] [1912] A.C. 333, 344; 28 T.L.R. 220.

for British Columbia[8]; that case was distinguished in *Attorney-General of British Columbia* v. *Attorney-General of Canada*[9].

On the first main proposition, therefore, this licence is one from which Winner derived his sole right to pass upon the highways, and it is within the competence of the province. The right of Winner to carry on his business on the highway of the province was subject to a valid condition in a licence granted to him pursuant to competent provincial legislation.

The second main proposition is that even though the condition in this particular licence and the licence itself might be construed as a regulation in the broad sense of persons on the highways rather than merely a licence to give this operator the right to pass on the highways, it is nevertheless submitted that the province had full power to regulate any operation on the highways, especially by mechanical vehicles of this kind. That is all that need be added to what has already been said in support of this proposition.

With regard to the third proposition—whether this is an "undertaking"—we are prepared, without abandoning the point, to adopt the grounds which Mr. Wilson will urge in support of that proposition.

H. J. Wilson Q.C. for the Attorney-General for Alberta, appellant. It is submitted, first, that the business of the respondent Winner is not a "work and undertaking" connecting New Brunswick with any other province or extending beyond the limits of the province, and therefore does not come within the exception mentioned in section 92 (10) (*a*) of the Act of 1867. Secondly, and alternatively, if Winner's business does come within the exception in section 92 (10) (*a*), nevertheless the licence granted to him under the Motor Carrier Act of New Brunswick is effective and binding on him under subheads (5), (9), (10), (13) and (16) of section 92 of the Act of 1867, because legislation which in pith and substance falls within one or more of the subheads of section 92 may incidentally affect matters over which the Parliament of Canada has jurisdiction under section 91. It is not proposed to submit any argument on the occupied field. If the business comes within section 92 (10) (*a*) then it is under Dominion jurisdiction. If in pith and substance this

1954 A.C. p. 552.

[8] [1923] A.C. 450; 39 T.L.R. 220.

[9] 1924] A.C. 203, 208; 40 T.L.R. 4.

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legislation of New Brunswick comes within one or more of the subheads of section 92, if that is its true nature and character, then it is of no consequence that it does affect in some respects matters which come under some subhead of section 91. This being an exception to local works and undertakings must be strictly interpreted; it is in derogation of a right specifically given to the provinces.

If "works and undertakings" may be read as "works or "undertakings" the situation is that if there is a work irrespective of an undertaking connecting one province with another, then it is under Dominion jurisdiction. It is submitted that that is not so. "Works and undertakings" have to be taken as a whole and cannot be split up. The matter must be looked at as an integrated whole, and both the works and undertaking must connect. With regard to "and" and "or," see *Mersey Docks and Harbour Board* v. *Henderson Brothers*.[10] The word "works" is defined in *City of Montreal* v. *Montreal Street Railway*[11]; and in *In re Regulation and Control of Radio Communications in Canada*[12] Lord Dunedin, giving the judgment of the Board and referring to the word "undertaking," said: "Undertaking is "not a physical thing, but is an arrangement under which "of course physical things are used." In *Canadian Pacific Railway Co.* v. *Attorney-General for British Columbia*[13] there was an undertaking which might be said to stretch across the provinces, but the works did not connect, being separate hotels, and therefore it did not come within the exception in section 92 (10) (*a*). Looking at the undertaking in the present case as a whole, it consists of buses plus the intention of running them; the highway is the connecting link and that is no part of Winner's undertaking.

1954 A.C. p. 553.

Another illustration in support of the submission that "undertaking" cannot be taken alone is *Rex* v. *Eastern Terminal Elevator Co.*,[14] which indicates that there must be not only the works connecting but the undertaking connecting as well. Merely because a milk business operates back and forth across a provincial boundary, could it be suggested that that comes within the jurisdiction of the Dominion Parliament? With regard to the *Radio Communication*

[10] (1883) 13 App. Cas. 595, 607, 610.
[11] [1912] A.C. 333, 342; 28 T.L.R. 220.
[12] [1932] A.C. 304, 315.
[13] [1950] A.C. 122; 66 T.L.R. (Pt. 1) 34.
[14] [1925] S.C.R. 434, 452.

case,[15] it is conceded that that part of the judgment which dealt with the meaning of the word "undertaking" is against the appellants in this case, but it is submitted that the Board in that case did specifically say that it was a telegraph, and if it was it came within the enumerated head expressly excluded from section 92. That case can be distinguished in its facts from this case; and secondly, in a later case, *Attorney-General for Canada* v. *Attorney-General for Ontario*,[16] Lord Atkin, giving the judgment, put the *Radio* case[17] on a ground from which this appellant takes some comfort: "The true ground of decision was that the con-"vention in that case dealt with classes of matters which "did not fall within the enumerated classes of subjects in "section 92, or even within the enumerated classes in "section 91."

If one were to construe those words "works and undertakings" disjunctively, and not as an integrated whole, that construction would be so wide that it would go a long way to destroy the autonomy of the provinces. It must have been intended that the phrase should have the narrower construction. It is conceded that the Dominion may provide for inter-provincial traffic; but when a carrier comes to our province and wants a licence to use our highways the provincial legislature has the right to say in what way and how he shall use the highways. If the province cannot prevent a person from Maine embussing and debussing passengers in New Brunswick, then he would be in a better position than the citizens of New Brunswick. The province can make legislative provisions covering all persons wherever they may come from. These highways are "local works and undertakings" in the province within the meaning of head (10) of section 92.

It must be re-emphasized that in this case this appellant is not relying entirely on "property and civil rights" and "matters of a local and private nature," but also on subheads (5), (9) and (10), and asks the Board to consider this matter from the point of view of proprietary rights: *Reference re Waters and Water Powers*.[18] The Dominion could not interfere with the title to the highways unless by expropriation or something of that kind.

1954 A.C. p. 554.

[15] [1932] A.C. 304.
[16] [1937] A.C. 326, 351; 53 T.L.R. 325.
[17] [1932] A.C. 304.
[18] [1929] S.C.R. 200, 224.

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It is proposed next to refer to the London Resolutions which preceded the passing of the British North America Act, 1867; although their evidential value may be slight, it is submitted that the resolutions are admissible.

C. F. H. Carson Q.C. for the respondent Winner. The Board refused to look at a draft bill in *Attorney-General for Canada* v. *Hallet & Carey Ld.*[19]

[After their Lordships had conferred among themselves, Lord Porter announced that their Lordships were persuaded that the material was not only of little evidentiary value but was not even admissible.]

H. J. Wilson Q.C. There is a close analogy in this case to *Shannon* v. *Lower Mainland Dairy Products Board.*[20] This Motor Carrier Act deals entirely with the licensing of people and the transporting of goods and passengers within the province, and, although it may incidentally affect people coming from outside, the true nature and character of the Act is to regulate within the province and to licence within the province persons who seek to use the highways of New Brunswick. The province has complete plenary power over its highways, and this case is concerned with what the province can do with its own property. The ownership and control of highways constructed by the province are within the exclusive jurisdiction of the province, and any user of those highways must be subject to conditions fixed by the province and subject to provincial control in every respect.

W. E. Darby Q.C. (A.-G. for Prince Edward Island) and *J. O. C. Campbell Q.C.* for the Attorney-General for Prince Edward Island, appellant.

Campbell Q.C. In the case filed by Prince Edward Island a slightly different attitude is adopted in that it is admitted that Winner had a work and undertaking. But our strongest argument is founded on the pre-eminent claims of section 92 as to the right of the province to deal in any way with highways or undertakings which have to do with highways. Control of highways, and regulation of traffic thereon, is within the exclusive jurisdiction of the provinces; and motor buses proceeding along such highways are exclusively sub-

1954 A.C. p. 555.

[19] [1952] A.C. 427, 433; [1952] 1 T.L.R. 1408.

[20] [1938] A.C. 708; 54 T.L.R. 1090.

ject to provincial law. The *Radio* case[21] and *In re Regulation and Control of Aeronautics in Canada*[22] cannot be read together with the present case: the judgment in the *Radio* case[21] is based on the pre-eminent claims of section 91; in the present case the claim of the province is based on the pre-eminent claims of section 92. [Reference was also made to *Egan's* case.[23]] A divided control between provinces and Dominion could only lead to confusion and inefficiency: divided control in connexion with highways would be much more serious than this Board found in the *Radio* case.[24].

John F. H. Teed Q.C. for the Attorney-General for New Brunswick and ex rel. S.M.T. (Eastern) Ld., respondent. The submissions are: (1) That the Motor Carrier Act is general in character and operates with respect to and affects all persons—aliens and citizens—when within the province. (2) Winner's operations will not in any event constitute a "work and undertaking" which had come under Dominion jurisdiction to the exclusion of provincial legislative jurisdiction. (3) Even if they could come under Dominion legislative jurisdiction, there is in fact no such legislation—it is conceded that there is not. No reference is made in the British North America Act to roads and highways as such—they are in the schedules to the Act. [*John Deere Plow Co. Ld.* v. *Wharton*[25] was referred to.] A road once laid out and constructed is a "work"; and a provincial road is unquestionably a local work, and local works and undertakings are assigned to the exclusive legislative jurisdiction of the province. There is, it is submitted, no road which connects New Brunswick with another province, because each road ends at the boundaries of the province.

All the highway legislation of New Brunswick before confederation contained some prohibitory provisions with respect to the user, and the Motor Vehicle Act, 1934, and the Motor Carrier Act also each contains some provisions prohibiting the use of the highways under certain conditions and for certain purposes. Winner as an international operator of an undertaking has no rights within Canada except such as are given to him by the law of the provinces or of the Dominion. And if there is no Dominion power—and on

[21] [1932] A.C. 304.
[22] [1932] A.C. 54.
[23] [1941] S.C.R. 396, 402, 415.
[24] [1932] A.C. 304.
[25] [1915] A.C. 330, 338.

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the subject of motor carriers there is no Dominion law—then with respect to those portions of his operations which are within each of the provinces he is subject to the provincial law, whatever it may be.

The word "works" means physical things, constructed to remain fixed in position: the illustrations are railways, canals and telegraph lines. The word "and" is conjunctive, and the expression "and undertakings" is used as joined to the works. The undertakings as added or joined to the works are tangible things which are properly essential or incidental to the operation of the works, and intangible things involved in the operation: the expression "and undertakings" adds both. As an antithesis, the word "works" in head (10) and (10) (*a*) and (*c*) does not mean or include physical things constructed to be mobile; buses or motor carriers are never a "work" within the meaning of the exception. The proposition, then, is that because motor-vehicles are not "works" within head (10) or (10) (*a*) the operation of mobile vehicles does not constitute an undertaking within the heading or exception unless there is also a work within the heading and exception and the operation of the vehicles is essential or properly incidental to the operation of the works. [Reference was made to *Wickham* v. *New Brunswick and Canada Railway Co.*[26]] If the words are to be construed disjunctively, it is submitted that the undertaking did not in the contemplation of those who used the expression include the user of transportation vehicles on the roads of a province. With regard to legislation enacted "in relation to" a matter and legislation which merely "affects" something, the classical example is *Bank of Toronto* v. *Lambe.*[27]

L. Tremblay Q.C. for the Attorney-General for Quebec, respondent. If there is the slightest reasonable doubt, then the judgment in this case must go in favour of the province: the *Aeronautics* case.[28] Winner's undertaking is not a "work" or an "undertaking"—taking them disjunctively—in the meaning in which those terms are used in section 92 (10) (*a*). It was not intended to include within (10) (*a*) all and every work and undertaking connecting one province with another or extending beyond the limits of the

[26] (1865) L.R. 1 P.C. 64. [27] (1887) 12 App. Cas. 575; 3 T.L.R. 742.
[28] [1932] A.C. 54, 70.

province, because if it had been intended to include all such works and all such undertakings the four particular works and undertakings need not have been mentioned; it need only have said "works and undertakings," and that would have included those four. The intention was to limit the works and undertakings to those similar to the four which have been specified. [Reference was made to *John Deere Plow Co. Ld.* v. *Wharton.*[29]] All that Winner needs to carry out his schedule are three buses; it cannot be right to say that that is a matter which should be given to the Federal Government to deal with.

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F. P. Varcoe Q.C. and *Frank Gahan Q.C.* for the Attorney-General for Canada, respondent. It is sought to support two propositions. First, Winner's undertaking is within the exclusive jurisdiction of the Dominion Parliament as being an undertaking connecting New Brunswick with Nova Scotia and extending beyond the limits of New Brunswick into the United States of America within the meaning of head (10) (*a*) of section 92. Secondly, a prohibition imposed by a New Brunswick law against the picking up and setting down of passengers by Winner's undertaking is a law in relation to that undertaking and is ultra vires since such a law is within the exclusive jurisdiction of the Dominion Parliament.

The allocation of legislative powers in sections 91 and 92 of the Act of 1867 is an interlacing system. With regard to the phrase "works and undertakings" in head (10) of section 92, the Dominion is not saying that "or" should be substituted for "and"; in legislation such as this, dealing with an enumerated series of matters, "and" is invariably used—it is the proper drafting form. The following cases before the Privy Council relating to head (10) (*a*) undertakings show how the jurisdiction between the provinces and the Dominion is divided in the case of such undertakings: *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours,*[30] *Madden* v. *Nelson and Fort Sheppard Railway,*[31] *Toronto Corporation* v. *Bell Telephone Company of Canada,*[32] *Toronto Railway* v. *Toronto City*[33] and *Luscar Collieries* v. *McDonald.*[34] If the legislature of the province passed an Act which, if there were a (10) (*a*) undertaking in

[29] [1915] A.C. 330, 338.
[30] [1899] A.C. 367.
[31] [1899] A.C. 626; 15 T.L.R. 484.
[32] [1905] A.C. 52; 21 T.L.R. 45.
[33] [1920] A.C. 426, 438.
[34] [1927] A.C. 925; 43 T.L.R. 801.

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existence, would prevent that undertaking from operating in the province, it is submitted that that legislation would be invalid. In other words, one does not have to wait for the (10) (*a*) undertaking to get going before it can be said that the legislative scheme is invalid. The whole tenour of the decisions is to distribute the legislative powers in an interlacing manner, and it cannot be said that any subject-matter is in a water-tight compartment: *Attorney-General for Manitoba* v. *Attorney-General for Canada*[35]; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*.[36]

The following are some of the principles which have been adopted by the Privy Council in connexion with such a problem as the present: (1) Any subject-matter of legislation which cannot be found in section 92 falls in section 91 under "peace, order and good government": *Attorney-General for Alberta* v. *Attorney-General for Canada*.[37] (2) The test to be applied when there is any question of ultra vires is that the true nature and character of the legislation—its pith and substance—has to be ascertained. The Dominion is particularly concerned with that principle here, because it is submitted that the pith and substance of the legislation in question is legislation in relation to (10) (*a*) undertakings and within Dominion power, and not to highway traffic regulation, which is within provincial jurisdiction. With regard to the suggestion that outsiders might be better off than citizens of the province if this appeal is not allowed, the answer is that regulation, if there is to be any, should be applied by the Dominion Parliament and not by local legislatures. When the board made it a condition that Winner should not embus or debus passengers within the province it was not a provision which related to highways. The Motor Carrier Act is a law in relation to transportation undertakings and is not a law in relation to the regulation of highway traffic as such. This appeal should be dismissed.

C. F. H. Carson Q.C. for Israel Winner, Canadian National Railway Company, and Canadian Pacific Railway Company, respondents. There are only two questions involved in the appeal: (1) whether Winner's undertaking is within the exclusive authority of the provincial legislature or is within the exclusive authority of the Parliament of Canada;

[35] [1929] A.C. 260, 268; 45 T.L.R. 146.

[36] [1896] A.C. 348, 371; 12 T.L.R. 388.

[37] [1943] A.C. 356, 371; 59 T.L.R. 160; [1943] 1 All E.R. 240.

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(2) if Winner's undertaking is within the exclusive authority of the Dominion Parliament, is the provincial legislation of New Brunswick as applied to Winner's undertaking in pith and substance in relation to that undertaking, or is it in relation to a subject within the exclusive legislative authority of the Province.

On the first question, it is submitted that his undertaking comes within the exclusive legislative authority of the Parliament of Canada because it is a (10) (*a*) undertaking. Winner's bus operation is just as much an inter-provincial and inter-national undertaking as is the operation of a railway from points in New Brunswick to points in Nova Scotia and between points in New Brunswick to points in the United States. There must be both works and undertaking to give the Dominion jurisdiction. Both railway and bus transport undertakings are modes of transport for carrying passengers and goods; both are providing substantially similar services to the public.

1954 A.C. p. 559.

Coming to question (2) (supra), Mr. Varcoe's submission on this head is adopted—that this New Brunswick law as applied to Winner's undertaking is in pith and substance in relation to that undertaking and not in relation to a provincial subject-matter. A good deal has been said by the appellants here about provincial legislation of general application, and they sought to apply authorities to a case of this kind where the Motor Carrier Act is admittedly of general application to all motor carriers. The answer to that argument is to be found in the *Manitoba* case.[38] This Motor Carrier Act bears a striking similarity to the sort of provisions one finds in the Dominion Railway Act. In pith and substance this particular statute is not in relation to highways. Applying the reasoning of *Attorney-General for Alberta* v. *Attorney-General for Canada*,[39] the New Brunswick legislature has purported to authorize the Motor Carrier Board to prohibit the operation of a (10) (*a*) undertaking, and legislation of that character is ultra vires the province and within Dominion jurisdiction. The present case is a clearer case than the *Alberta* case.[39] [Reference was also made to the *Bell Telephone Company* case.[40]] The appeal should be dismissed.

[38] [1929] A.C. 260; 45 T.L.R. 146.

[39] [1939] A.C. 117, 131; 55 T.L.R. 65; [1939] 1 All E.R. 423.

[40] [1905] A.C. 52, 57, 59; 21 T.L.R. 45.

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With regard to the cross-appeal, it is directed to the second part of the answer given by the Supreme Court— that it is within the legislative powers of the province to prohibit Winner by his undertaking from carrying passengers from place to place within the province incidentally to his other operations— and there are three propositions of principle which are appropriate: (1) In the case of an undertaking coming within head (10) (*a*) of section 92 it is not competent for a provincial legislature to interfere with the operations or proposed operations of that undertaking or part of it in the province. (2) Provincial legislation purporting to impose such an interference would be ultra vires as being legislation in relation to a (10) (*a*) undertaking. (3) In the case of such an undertaking it is not competent for a provincial legislature to interfere with the local business of the undertaking where such local business forms part of one single undertaking. The authority relied on in support of those propositions is the *Bell Telephone Company* case [40]; it is authority that Winner's undertaking is one single (10) (*a*) undertaking. See also the *Radio* case.[41] In the light of those cases it is clear that if there is one single undertaking comprising inter-provincial business so as to come within (10) (*a*), and another branch of such business is intra-provincial, such an undertaking is in its entirety within the exclusive legislative authority of the Parliament of Canada. In the present case no valid distinction is to be drawn between the inter-national and inter-provincial branch, and the intra-provincial branch, unless these two branches or heads constitute two separate undertakings. It is submitted that they are one.

1954 A.C. p. 560.

The question on the cross-appeal is: is Winner's carriage of intra-provincial traffic along his inter-national and inter-provincial route a separate undertaking so as to be outside the undertaking which, under section 92 (10) (*a*), is under the sole legislative jurisdiction of the Dominion Parliament and so as to be a local undertaking within provincial legislative competence? The only answer which can be given to that question on this Record is "No." If the appeal succeeds it is conceded that the cross-appeal fails; if the appeal fails, the cross-appeal should succeed. So far as the carriage of Winner's intra-provincial traffic is concerned, it is the same undertaking as his inter-provincial and inter-

[40] [1905] A.C. 52.

[41] [1932] A.C. 304.

national. An inter-provincial ship or bus undertaking is not split into separate undertakings by provincial boundaries. The local undertaking is linked up with the inter-provincial undertaking so as to form one system, and the local undertaking so comes under the jurisdiction of the Dominion Parliament. [Reference was made to *Luscar Collieries* v. *McDonald*.[42]]

The determination of the question in the cross-appeal is of some considerable concern to the two railway company respondents. Winner has never claimed an unqualified right, free from provincial legislation, to carry passengers between two points within the province not connected with his inter-national and inter-provincial undertaking. If he did that it would be a separate undertaking. The only relevant question is, what is the undertaking? It is important that this Board should consider whether the principle of the *Bell Telephone Company* case[43] is to be applied to this case or whether the test which the judges of the Supreme Court have suggested is the right one. Both in principle and on authority the whole undertaking comes under the jurisdiction of the Dominion Parliament whatever purely local elements it may contain. There is nothing in the facts here to support the view that there were here two separate undertakings—intra-provincial and inter-provincial.

1954 A.C. p. 561.

There can be no difference in principle between any undertakings specifically mentioned in (10) (*a*), such as railways and telegraphs, and one the subject-matter of which comes within the meaning of (10) (*a*). The proper test is whether the particular undertaking under consideration is a connecting undertaking, and, if it is, it is immaterial that the local traffic is part of that undertaking. "Severability" is not the test. The establishment of stations for railways is not a relevant distinction; and in any case buses must have places to stop at. The appeal as against Winner should be dismissed, with costs, and the cross-appeal should be allowed, with costs. Costs are not asked for against the respondent railway companies either on the appeal or the cross-appeal, because they are interveners.

F. P. Varcoe Q.C., in submitting on behalf of the Attorney-General for Canada that the cross-appeal should be allowed, adopted Mr. Carson's argument.

[42] [1927] A.C. 925, 932; 43 T.L.R. 801.

[43] [1905] A.C. 52; 21 T.L.R. 45.

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J. A. Y. MacDonald Q.C. and *Ralph Millner* for the Attorney-General for Nova Scotia, respondent. The position taken by Nova Scotia was, and still is, that the legislation here in issue is for the most part valid, but that in so far as it relates to inter-national or inter-provincial transportation it is invalid and ultra vires the provincial legislature. The decision of the Supreme Court of Canada is supported, and it is submitted that both the appeal and the cross-appeal should be dismissed. The first proposition is that, except as to regulation 13 (made under the Motor Vehicle Act, 1934), that Act of 1934 and the regulations made thereunder are legislation in respect of highways and highway traffic, are of general application and are therefore intra vires the legislature of New Brunswick. The second proposition, which is closely related, is that, except as to the condition imposed in the licence granted to Winner, the provisions of the Motor Carrier Act and the orders and regulations made thereunder are legislation of general application in relation to highways and to the intra-provincial transportation of passengers and goods and are consequently intra vires the province and validly effective. Regulation 13 by its terms has application to, and only to, an inter-provincial or inter-national operation; there is no authority under that regulation to impose conditions of general application. In so far as regulation 13 is legislation in relation to inter-provincial or inter-national transportation as such it is ultra vires the province. The condition imposed in Winner's licence is in relation to inter-provincial or inter-national operations and is also therefore ultra vires.

1954 A.C. p. 562.

With regard to section 92 (10) (*a*), it is submitted that the phrase "works and undertakings" as there used is descriptive of those works and undertakings which by their nature are susceptible to or capable of effective legislation or regulation on the part of a provincial legislature of limited territorial jurisdiction, and in contrast to inter-national or inter-provincial or non-local works and undertakings which by their nature are not susceptible to effective legislation on the part of the provincial legislature. "Local" means subject to effective legislation by a provincial legislature. For the decision of this case all that it is necessary for this Board to decide is that the condition applying to the licence is not within the powers of the province. The province cannot make a law "in relation to" that undertaking, though it may be "affected" by all sorts of laws of the

province. The Board may find that this particular condition is ultra vires the province by reason that the power to impose it is not conferred on the province by any head of section 92; that is all that is necessary to the decision, and it is submitted that the decision should be confined to that point. The question in *Canadian Pacific Railway Co.* v. *Attorney-General for British Columbia*[44] was what was the extent of the railway undertaking; and in the *Bell Telephone Company* case[45] the undertaking was defined by the Act of incorporation and, secondly, by the nature of the physical performance. With regard to the intra-provincial business being severable and within provincial legislative competence, the judgment of the Supreme Court is supported and adopted.

Dana Porter Q.C., in reply, stated that he was authorized to reply for all the appellants. The main issue is as to the pith and substance of the law in question. One of the grounds on which Mr. Wilson said that highways were exclusively within provincial jurisdiction was that they were local works and undertakings; and there are other grounds—property and civil rights. The submission is that the subject-matter of the legislation is the control, regulation and use in all aspects of the highways in New Brunswick. That is the pith and substance of the legislation, and what was done under the statute was entirely within the powers of the provincial board in that connexion. The question is whether this is highway legislation in the ordinary way, or legislation directed to transport. It is submitted that transportation and highways are so completely interwoven with the control of highways that it is difficult to separate the two. Highways are local works within the province and therefore within the exclusive control of the province, and the right to restrict certain people from going on those highways is entirely provincial.

1954 A.C. p. 563.

There is no real analogy between a railway and a bus operator; the latter is in a different situation; there is no inter-provincial work. The whole question comes down to the control of a local work. The highway is a local work which does not cross the boundary. "Connecting work" within the meaning of the section is one which crosses the boundaries of the province. Where two roads in different

[44] [1950] A.C. 122, 143; 66 T.L.R. (Pt. 1) 34.

[45] [1905] A.C. 52; 21 T.L.R. 45.

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provinces combine they are not a connecting work. A railway has no power to cross a highway, and can only do so by permission of the province, which can impose conditions, such as erecting a gate. Section 92 (10) (*a*) gives Winner no power to enter upon the highways of New Brunswick except upon the terms imposed by the provincial authority. *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.*[46] deals with the subject-matter of ancillary powers; some approbation was given to the dissenting judgment of Duff J. when the decision was reversed by the Privy Council.[47] [Reference was also made to *Attorney-General for Alberta* v. *Attorney-General for Canada.*[48]] If the Dominion Parliament at any time attempts to exercise powers under section 92 (10) (*a*) which might by ancillary or incidental powers give rights of passage over a local work—a highway—it is submitted that that legislation would be ultra vires unless it were ancillary or incidental to the exercise of powers with respect to an inter-provincial undertaking. And further, no matter what the scope of the inter-provincial undertaking may be, it would not be necessary to give any rights over a provincial highway by legislation of that kind, and for two reasons: (i) the Dominion Parliament could provide for inter-provincial highways which would be connecting works; or (ii) the Dominion Parliament could declare a provincial highway, if it considered necessary, to be a work for the general advantage of Canada, and thereby acquire control over it. So long as that method is properly open, it is not necessary to provide for any running rights over provincial works such as highways.

1954 A.C. p. 564.

Summarizing: (1) A Dominion railway undertaking in all its aspects is inseparably identified with a connecting work under section 92 (10) (*a*), and by the Railway Act is subject to a declaration under section 92 (10) (*a*). (2) An inter-provincial motor carrier undertaking depends for its very existence on licences to use provincial highways, which are property within the province—local works under section 92 (10). It thus becomes identified with local works and not connecting works. (3) No motor carrier may use a highway as of right. (4) The respondents in this case do not rely on any general public right of passage, but

[46] (1913) 48 S.C.R. 98, 114.
[47] [1914] A.C. 1067, 1076.
[48] [1939] A.C. 117; 55 T.L.R. 65; [1939] 1 All E.R. 423.

rely entirely on section 92 (10) (*a*). (5) Section 92 (10) (*a*) confers in its terms no right to use a local work. (6) The Federal Parliament has passed no law under section 92 (10) (*a*) purporting to confer any power to use highways. (7) Parliament has not authorized the construction of federal highways—inter-provincial highways. (8) Parliament has made no declaration as to highways under section 92 (10) (*a*). (9) The condition of Winner's licence relates to the use of highways and, even if it does not, it is a condition subject to which the right to use a highway is given. (10) The contention of the respondents necessarily implies the right of Parliament under section 92 (10) (*a*) to exercise control over a local work under section 92 (10) constructed by the province.

As to the cross-appeal, and the intra-provincial operations, the jurisdiction of the province is plenary. "Undertaking" has been defined very loosely in certain aspects: the *Radio* case [49]; *Canadian Pacific Railway Co.* v. *Attorney-General for British Columbia.*[50] In the *Bell Telephone Company* case,[51] which was relied on by the cross-appellant, there was the one work, which was inter-provincial, just as a railway, and was under the control of the Dominion legislature. The *Luscar Collieries* case[52] really does not assist on the issue in this case. On this part of the case the Supreme Court was right.

C. F. H. Carson Q.C. in reply on the cross-appeal. There was one single undertaking. [Reference was made to the *Bell Telephone Company* case,[53] the *British Columbia Electric Railway* case, [54] and to *Toronto Railway Co.* v. *Toronto City,*[55] where the Privy Council took a different view from Duff J. in the *British Columbia Electric Railway* case[54]; and on the question of costs on the cross-appeal to *Attorney-General for Quebec* v. *Nipissing Central Railway Co. and Attorney-General for Canada.*[56]]

1954 A.C. p. 565.

C. R. Magone Q.C. for the Attorney-General for British Columbia, appellant.

S. M. T. (Eastern) Ld., Maccam Transport Ld. and Carwill Transport Ld. did not lodge cases and were not represented.

[49] [1932] A.C. 304.
[50] [1950] A.C. 122; 66 T.L.R. (Pt. 1) 34.
[51] [1905] A.C. 52; 21 T.L.R. 45.
[52] [1927] A.C. 925; 43 T.L.R. 801.
[53] [1905] A.C. 52; 21 T.L.R. 45.
[54] (1913) 48 S.C.R. 98; [1914] A.C. 1067.
[55] [1920] A.C. 426.
[56] [1926] A.C. 715; 42 T.L.R. 591.

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1954. Feb. 22. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above and the questions for the opinion of the Supreme Court of New Brunswick, and continued: In order to appreciate the basis upon which it was thought necessary to make those inquiries, it is essential to set out a number of the provisions of the relevant Acts, but their Lordships have not thought themselves required to deal with the third question or to transcribe any portion of the Motor Vehicle Act of 1934, since admittedly no action has been taken under that Act and, moreover, as the Supreme Court of New Brunswick have pointed out, the principles upon which any questions arising under that Act are to be determined involve considerations similar to those applicable to the case of the Motor Carrier Act. Nor have their Lordships considered it desirable to set out the whole of the latter Act. Essential sections have alone been transcribed. The bearing of other sections can best be dealt with where they affect the argument, and the amendments of the Motor Carrier Act which have been made from time to time can best be treated in the same way.

The provisions which their Lordships feel constrained to set out are as follows: "(2).—(1) In this Act unless the "context otherwise requires:—(*a*) 'Board' means the Motor "Carrier Board as hereinafter constituted. (*b*) 'Licence' "means a licence granted to a motor carrier under this "Act. (*c*) 'Licensed Motor Carrier' means a motor carrier "to whom a licence has been granted by the board under "this Act . . . (*e*) 'Motor Carrier' means a person, firm or "company that operates or causes to be operated in the
1954 A.C. p. 566. "province a public motor bus or a public motor truck. "(*f*) 'Public Motor Bus' means a motor vehicle plying or "standing for hire by, or used to carry, passengers at "separate fares [am. 1939, c. 37, 1949, c. 47.] (*h*) 'Regu- "lations' mean and include the rules and regulations and "general orders made by the board under this Act.

"3.—(1) The members of the Board of Commissioners of "Public Utilities are hereby constituted a board for the "purposes of this Act and shall be known as the Motor "Carrier Board. The chairman and secretary of the said "Board of Commissioners of Public Utilities shall be, "respectively, the chairman and secretary of the Motor "Carrier Board. (2) In the absence of any member of

"the board from a regularly constituted meeting thereof "the secretary shall sit and perform the duties of a member "of the board. (3) Without limiting any powers, duties, "authority or jurisdiction conferred or imposed by this "Act, all powers, duties, authority and jurisdiction as are "vested in the Board of Commissioners of Public Utilities "for common carriers are hereby vested in the board over "motor carriers except as otherwise specifically provided "in this Act.

"4. The board may grant to any person, firm or company "a licence to operate or cause to be operated within the "province public motor buses or public motor trucks over "specified routes or between specified points.

"5.—(3) In determining whether or not a licence shall be "granted, the board shall give consideration to the trans-"portation service being furnished by any railroad, street "railway or licensed motor carrier, the likelihood of pro-"posed service being permanent and continuous throughout "the period of the year that the highways are open to "travel and the effect that such proposed service may have "upon other transportation services. (4) If the board "finds from the evidence submitted that public convenience "will be promoted by the establishment of the proposed "service, or any part thereof, and is satisfied that the appli-"cant will provide a proper service, an order may be made "by the board that a licence be granted to the applicant in "accordance with its finding upon proper security being "furnished.

"9. If at any time conditions are such that in the opinion "of the chief highway engineer, a highway is being or would "be damaged by the operation of any public motor bus or "public motor truck, the chief highway engineer may order "an immediate discontinuance of operation on such high-"way until further order.

"11. Except as provided by this Act, no person, firm or "company shall operate a public motor bus or public motor "truck on the highways within the province without hold-"ing a licence from the board authorizing such operations "and then only as specified in such licence and subject to "this Act and the regulations.

1954 A.C. p. 567.

"17.—(1) The board may from time to time make regu-"lations fixing the schedules and service, rates, fares and

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"charges of licensed motor carriers, prescribing forms, . . . "requiring the filing of returns, reports and other data and "generally make regulations concerning motor carriers and "public motor buses and public motor trucks as the board "may deem necessary or expedient for carrying out the "purposes of this Act and for the safety and convenience "of the public and may from time to time repeal, alter and "amend any such orders, rules and regulations. All general "regulations shall be subject to the approval of the Gover-"nor in Council and on being approved shall be published "in the Royal Gazette. [am. 1940, c. 11.]"

The Act was originally passed in 1937, but certain amendments have been made in it since that date. Two alterations in section 4 may be referred to inasmuch as some reliance was placed upon them as assisting in the construction of the provisions of the Act. Originally the section ended "over specified routes *and* between specified points "within the province." The alteration from "and" to "or" in their Lordships' opinion is immaterial to any question which they have to decide. As to the omission of the words "within the province" they agree with the Supreme Court of Canada that, whatever may have been in the mind of the provincial authorities in deleting them, those words must be implied inasmuch as the province can exercise no authority over another province or over a foreign country.

The vital question for their Lordship's determination is what restrictions are or can be placed by the province of New Brunswick upon inter-state or inter-national undertakings by reason of the provisions of the Motor Carrier Act, and whether the terms of the licence actually granted to Mr. Winner are authorized under that Act.

The powers entrusted to the Dominion and province respectively are those set out in sections 91 and 92 of the British North America Act, 1867. Well known as those provisions are, their Lordships think that the matter is clarified by setting out the relevant provisions of section 92, omitting, however, subsection (16), inasmuch as that subsection in the present case adds nothing to the arguments which depend upon the wording of subsection (10).

1954 A.C. p. 568.

"92. In each province the legislature may exclusively "make laws in relation to matters coming within the classes "of subjects next hereinafter enumerated; that is to say:— "(10) Local works and undertakings other than such as

"are of the following classes: (*a*) Lines of steam, or other "ships, railways, canals, telegraphs, and other works and "undertakings connecting the province with any other or "others of the provinces, or extending beyond the limits of "the province: (*b*) Lines of steam ships between the pro- "vince and any British or foreign country: (*c*) Such works "as, although wholly situate within the province, are before "or after their execution declared by the Parliament of "Canada to be for the general advantage of Canada or for "the advantage of two or more of the provinces: (13) "Property and civil rights in the province."

It is now authoritatively recognized that the result of these provisions is to leave local works and undertakings within the jurisdiction of the province but to give to the Dominion the same jurisdiction over the excepted matters specified in (*a*), (*b*) and (*c*) as they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under section 91: see *City of Montreal* v. *Montreal Street Railway Co.*[1]

The Supreme Court of the province (Richards C.J., Harrison and Hughes JJ.) answered all three questions, and at the expense of repetition but for the sake of clarity their Lordships again set out the questions inserting the answers given by that court:—

1. "Are the operations or proposed operations of the "defendant within the province of New Brunswick or any "part or parts thereof as above set forth, prohibited or in "any way affected by the provisions of the Motor Carrier "Act, 1937, and amendments thereto, or orders made by "the said Motor Carrier Board?"

Answer: "Yes, prohibited, until the defendant complies "with the provisions of the Act."

2. "Is 13 Geo. 6, c. 47, 1949, intra vires of the legislature "of the province of New Brunswick?"

Answer: "Yes, in respect of this defendant." (Richards C.J. and Hughes J. answering simply "Yes.")

3. "Are the proposed operations prohibited or in any way "affected by regulation 13 of the Motor Vehicle Act, "chapter 20 of the Acts of 1934 and amendments, or under "sections 6 or 53 or any other sections of the Motor "Vehicle Act?"

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[1] [1912] A.C. 333, 342; 28 T.L.R. 220.

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Answer: "Yes, until the defendant complies with the "provisions of the Act, and the regulations made thereunder."

From that decision an appeal was taken by Mr. Winner to the Supreme Court of Canada by leave of the Supreme Court of New Brunswick. Meanwhile the Attorney-General of New Brunswick gave notice of his intention to intervene, and at a later time, pursuant to orders made by the Supreme Court of Canada, the Attorney-Generals for Canada and for the provinces of Ontario, Quebec, Nova Scotia, British Columbia, Alberta and Prince Edward Island, together with the Canadian National Railway Company, Canadian Pacific Railway Company, Maccam Transport Company and Carwill Transport Limited intervened.

When the matter came to be considered by the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright, and Fauteux JJ.) that court pointed out that it was concerned not with a reference but with an action, that the claim was in its origin made by one motor carrier against another motor carrier asking that he be prohibited by injunction from taking up and setting down passengers in the province of New Brunswick, and that the questions asked involved the consideration of matters outside those involved in the decision of the dispute raised by the pleadings.

The Chief Justice, indeed, took the view that the only power of the province was to deal with the appellant under the Motor Vehicles Act since (1) by section 22 the provisions of the Motor Carrier Act were to be deemed to be in addition to the provisions of the Motor Vehicles Act; (2) the Motor Vehicles Act provided for the treatment of non-residents whereas the Motor Carrier Act did not; (3) in the case of non-residents, therefore, the Motor Carrier Board had no authority to give or withhold or limit the terms of a licence; (4) there was no evidence or contention that Mr. Winner had not complied with the provisions of the Motor Vehicles Act, and (5) there was therefore no ground on which the court could grant an injunction. The other members of the court agreed with the Chief Justice that there was no reference and that the sole question for their determination was whether as between the two parties the

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one could obtain as against the other an injunction prohibiting him from picking up or setting down passengers within the province. In their view, however, the provisions of the Motor Carrier Act affected the position of a foreigner, and the dispute between the parties was whether under those provisions or by the terms of their licence the board had power to prohibit Mr. Winner from embussing or debussing passengers within the province of New Brunswick. They did not determine that the board had no power to issue a licence to a non-resident, and accordingly based their decision upon a consideration whether the Motor Carrier Act or the terms of the licence were authorized by the powers given to a province under the British North America Act.

Their Lordships are not prepared to hold that the Motor Carrier Board lack authority to deal with residents in provinces or countries other than New Brunswick or to decide that the provisions of the Motor Carrier Act have no application to the case. Nor, indeed, was any such contention put before them. They therefore proceed to discuss the problem whether the Motor Carrier Act or the licence is ultra vires the jurisdiction of the province.

It was on this basis that the matter was dealt with by the Supreme Court of Canada, and accordingly that court did not answer the individual questions put to them, but summed up their conclusions in the following order: "And "this court, proceeding to render the judgment which "should have been rendered by the said Supreme Court "of New Brunswick, Appellate Division, did order and "adjudge that the answer to such parts of the questions "submitted as it is considered necessary to answer for the "disposition of the issues properly raised in the pleadings "is as follows:—

"1. It is not within the legislative powers of the province "of New Brunswick by the statutes or regulations in "question, or within the powers of the Motor Carrier "Board by the terms of the licence granted by it, to pro-"hibit the appellant by his undertaking from bringing "passengers into the province of New Brunswick from "outside said province and permitting them to alight or "from carrying passengers from any point in the province "to a point outside the limits thereof, or from carrying "passengers along the route traversed by its buses from "place to place in New Brunswick, to which passengers

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1954 A.C. p. 571.

"stop-over privileges have been extended as an incident "of the contract of carriage; but except as to passengers to "whom stop-over privileges have been extended as afore- "said it is within the legislative powers of the province of "New Brunswick by the Statutes and regulations in "question, and within the powers of the Motor Carrier "Board by the terms of the licence granted by it, to pro- "hibit the appellant by his undertaking from carrying "passengers from place to place within the said province "incidentally to his other operations."

It will be observed that the order in question adopts a compromise which does not appear to have been contended for by either side, viz., whilst permitting the taking up or setting down of passengers engaged in an inter-provincial or inter-national journey, it prohibited the carrying of persons between two points where the journey was wholly within the province.

From that decision there was an appeal, by special leave, to their Lordships' Board by the Attorney-General for Ontario and others against that part of the judgment which permitted any kind of picking up or setting down within the province of New Brunswick whether in the course of a journey beginning outside the province and ending within it or in the course of a journey beginning within it and ending without the province. There was also a cross-appeal by Mr. Winner and others against the prohibition of purely intra-state traffic, that is, carriage from one point within the province to another point also within it.

Before their Lordships when dealing with the matter of the appeal it was urged (1) that Mr. Winner's business did not come within the exception contained in section 92 (10) (*a*), and (2) that in any case the province as owner of, or as being in control of, its highways had jurisdiction over them not only to licence operations upon them but to regulate them in all respects. By virtue, it was said, of the powers of the province to control provincial highways and traffic, the Motor Carrier Board had power to grant or refuse a licence to Mr. Winner at their discretion. It was acknowledged that it had in fact granted him a licence, but asserted that the condition attached to the licence was merely a condition upon which he became entitled to operate upon the highways of the province, not a regulation of his business or undertaking.

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The first proposition involves a close and careful consideration of the terms and effect of section 92 (10) (*a*). The argument was put in a number of ways. In the first place it was said that works and undertakings must be read conjunctively, that the subsection has no operation unless the undertaking is both a work and an undertaking—the former a physical thing and the latter its use. There was, it was maintained, in the present instance no work, and the existence of a work was an essential element in order to make the subsection applicable. The necessity for the existence of both elements might, it was said, be illustrated by considering the case of a railway, where there was both a track and the carriage of goods and passengers over it, and in construing the words "works and undertaking" regard must be paid to the words associated with them in the subsection.

1954 A.C. p. 572.

Their Lordships do not accept the argument that the combination of a work and an undertaking is essential if the subsection is to apply. Perhaps the simplest method of controverting it is to point out that the section begins by giving jurisdiction to the provinces over local works and undertakings. If, then, the argument were to prevail, the province would have no jurisdiction except in a case where the subject-matter was both a work and an undertaking. If it were not both, but only one or the other, the province would have no authority to deal with it, and at any rate under this section local works which were not also undertakings and local undertakings which were not works would not be subject to the jurisdiction of the province—a result which, so far as their Lordships are aware, has never yet been contemplated. Moreover, in subsection (10) (*c*) the word "works" is found uncombined with the word "undertakings," a circumstance which leads to the inference that the words are to be read disjunctively so that if either works or undertakings connect the province with others or extend beyond its limits, the Dominion, and the Dominion alone, is empowered to deal with them.

The case of steamships is an even more potent example of the difficulty of reconciling the suggested construction with the wording of the section. Lines of steamships between the province and any British or foreign country can carry on their operations without the existence of any works. The only connecting link which they provide is by passing

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to and fro from the one to the other. Their Lordships must accordingly reject the suggestion that the existence of some material work is of the essence of the exception. As in ships so in buses it is enough that there is a connecting undertaking.

It is true, and was contended, that it is possible to postulate that section 92 (10) has a limited scope and deals only with matters which are both works and undertakings. Works alone and undertakings alone are in this aspect entrusted to the province under subsection (13) as being property and civil rights, or under (16) as being matters of a merely local or private nature in the province. It was argued, accordingly, that jurisdiction over inter-connecting works and undertakings is given to the Dominion under the general words inserted at the beginning and end of section 91 but not under section 92 (10). In terms, however, the language of section 92 (10) (*c*) embraces a wider subject-matter and, in their Lordships' view, is not confined to so limited a construction. All local works and all local undertakings are included under the phraseology used, and it is in their Lordships' opinion immaterial that ex abundante cautela they are again covered by subsection (13).

1954 A.C. p. 573.

If the province is given authority over both local works and local undertakings it follows that the exceptional works and undertakings in subsection (10) (*a*) likewise comprise both matters.

Some illumination is, as their Lordships think, given by a consideration of the decision in the *Radio* case (*In re the Regulation and Control of Radio Communication in Canada*).[2] The question in issue was whether the control of radio transmission was in whole or in part within the jurisdiction of the Dominion or of a province, and it was held that the sole authority resided with the Dominion. Undoubtedly the main contention in that case was that a convention had been entered into between Great Britain, Canada and other Dominions and Colonies on the one part and foreign countries on the other, and that accordingly under the general powers conferred upon it by section 91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada the Parliament of Canada had under the convention a power similar to that which it would have had under section 132 if the convention had been a

[2] [1932] A.C. 304, 314-5.

treaty between the British Empire, as an entity, and foreign countries. This aspect of the decision is stressed by their Lordship's Board in the Labour Convention case (*Attorney-General for Canada* v. *Attorney-General for Ontario*).[3] But that case was concerned with the effect of section 132 and except incidentally does not mention section 92.

The *Radio* case,[4] on the other hand, expressly applies the provisions of section 92 (10): "Their Lordships," it is said, "draw special attention to the provisions of head (10) of "section 92. These provisions, as has been explained in "several judgments of the Board, have the effect of reading "the excepted matters into the preferential place enjoyed "by the enumerated subjects of section 91." After quoting the words of this subsection, the judgment continues[4]: "Now, does broadcasting fall within the excepted matters? "Their Lordships are of opinion that it does, falling in (a) "within both the word 'telegraphs' and the general words "'undertakings connecting the province with any other or "'others of the provinces or extending beyond the limits "'of the province.'" Later the judgment proceeds to say "undertaking is not a physical thing but is an arrangement "under which of course physical things are used."

1954 A.C. p. 574.

In their Lordships' view, these expressions are directly applicable to the present case. In the *Radio* case[4] there was no connecting work, only a connecting undertaking, unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connexion.

It is argued that the provinces are entrusted with local works and undertakings subject, however, to the exception that they must be "other than such as are in the following classes," and that on its true construction the section must mean "other than such *local* works and undertakings as are "within those exceptions." The submission goes on to maintain that ex concessis Mr. Winner's work or undertaking is not local, having no anchorage, as it were, within the province, and for that reason is not within the exception. Their Lordship's Board does not so read the subsection. In their opinion "other than such" merely means such works and such undertakings as are within the categories thereafter set out.

[3] [1937] A.C. 326, 351; 53 T.L.R. 325.

[4] [1932] A.C. 304, 314.

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The argument can be tested by considering its effect upon one of the specific subjects mentioned, e.g., railways. A railway is an exception to local works and undertakings because it is included in the words "other than such," etc. But if the appellants' argument is sound the section must mean local works and undertakings other than such local works and undertakings as are in the category of railways; and, as the exception only includes *local* works, it would take local railways out of the jurisdiction of the province, which it does not, and would not comprehend inter-connecting railways, which have always been held to be included, and the inclusion of which is obviously one of the objects of the subsection.

One further point was put forward upon this aspect of the case. It was suggested that, whatever view be taken of the matters with which their Lordships have dealt, yet Mr. Winner's activity never became an undertaking until he received a licence; until then it was but a project; he could not get to work before he had a licence. It was true, the argument went on, that he had obtained a licence, but his licence only permitted him to run through New Brunswick without embarking or disembarking passengers. That was his undertaking and, so far as New Brunswick was concerned, it could not be enlarged by a claim that it was an inter-provincial or inter-national undertaking.

1954 A.C. p. 575.

Their Lordships are not prepared to accept the contention that an undertaking has no existence until it is carried into effect or is capable of being lawfully carried out. It may be an undertaking at any rate if the promoter has done everything which was necessary on his part to put it in motion, and has made all the essential arrangements. Indeed, the argument that the undertaking did not come into existence until a licence was granted and the transporting actually began is, in their Lordships' view, inconsistent with the opinion expressed by the Board in *Toronto Corporation* v. *Bell Telephone Company of Canada*,[5] where it is said: "The "view of Street J. apparently was that, inasmuch as the "Act of incorporation did not expressly require a connection "between the different provinces, the exclusive jurisdiction "of the Parliament of Canada over the undertaking did "not arise on the passing of the Act, and would not arise "unless and until such a connection was actually made.

[5] [1905] A.C. 52, 58; 21 T.L.R. 45.

"In the meantime, in his opinion, the connection was a "mere paper one, and nothing could be done under the "Dominion Act without the authority of the legislature of "the province. This view, however, did not find favour "with any of the learned Judges of Appeal. In the words "of Moss C.J.O., 'the question of the legislative jurisdiction "'must be judged of by the terms of the enactment, and "'not by what may or may not be thereafter done under it. "'The failure or neglect to put into effect all the powers "'given by the legislative authority affords no ground for "'questioning the original jurisdiction.' If authority be "wanted in support of this proposition, it will be found in "the case of *Colonial Building and Investment Association* "v. *Attorney-General of Quebec*,[6] to which the learned "Judges of Appeal refer."

In any case Mr. Winner had obtained a licence and has been exercising a business of transportation under it and has not limited his undertaking to the terms of his licence.

To succeed upon this point the appellants would have to say that this is a local work and undertaking because it makes use of the provincial roads, and that the only existing undertaking is one in which the respondent cannot take up or set down passengers in the provinces. In fact, however, another undertaking does exist, viz., that of through carriage and also of picking up and setting down passengers within the province and that undertaking existed from the initiation of Mr. Winner's activities and still exists since, whether rightfully or wrongfully, he has from the start embussed and debussed passengers within the province. That he does so is stated in the facts, and whether the picking up and setting down of passengers is lawful or unlawful is the matter which their Lordships have to determine.

1954 A.C. p. 576.

On this part of the case, therefore, the Board agrees with the majority of the judges of the Supreme Court; and though it is true that the Chief Justice does not find it necessary to consider the point, he at least has expressed no opinion against it.

The second contention put forward on behalf of the appellants was that whatever their exact legal position with regard to the roads, they admittedly make, maintain and control them; the roads are local works and undertakings

[6] (1883) 9 App. Cas. 157, 165.

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constructed and maintained by the province; in that capacity it is entitled to regulate their use in any way it pleases and, indeed, to prohibit their use if it so wishes. The contention is an important one because, if it is true, interprovincial undertakings connecting one province with another are within the jurisdiction of the Dominion, but can be totally sterilized by Acts and regulations of the province curtailing or preventing the use of its roads. It was alleged that the roads are property in the province—as indeed they are—that roads of one province are divided by an imaginary line from those of another province or another nation at the point of meeting: there is therefore no connecting work and, their roads being local, the province has absolute power over their uses, i.e., both the method of use and whether they may or not be used at all.

Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.

It would not be desirable, nor do their Lordships think that it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind, nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible. So isolationalist a policy is indeed unthinkable. The roads exist and in fact form a connexion with other provinces and also, in this case, with another country. Since in their Lordships' opinion Mr. Winner is carrying on an undertaking connecting New Brunswick both with Nova Scotia and the State of Maine there exists an undertaking connecting province with province and extending beyond the limits of the province.

1954 A.C. p. 577.

Prima facie at any rate, such an undertaking is entrusted to the control of the Dominion and taken out of that of the province. No doubt if it were not for section 90 (10) (*a*) of the British North America Act the province, having jurisdiction over local works and undertakings and over

property and civil rights within the province, could have prohibited the use of, or exercised complete autocratic control over, its highways, but the subsection in question withdraws this absolute right where the undertaking is a connecting one. To this limitation some meaning must be given, and their Lordships cannot accept the view that the jurisdiction of the Dominion is impaired by the province's general right of control over its own roads. So to construe this subsection would, in their Lordships' opinion, destroy the efficacy of the exception.

The limitation of the jurisdiction of Dominion and province has been many times canvassed and litigated both in the Canadian courts and in the Privy Council. Undoubtedly the province has wide powers of regulation. Many instances were adduced in the course of argument and their Lordships may refer to certain of those most relied upon. In *Colonial Building & Investment Association* v. *Attorney-General of Quebec*[6] the provincial mortmain laws were said to be contrary to the jurisdiction given to the Dominion in respect of Dominion companies. The principles relied on are set out in the following words[7]: "But the powers "found in the Act of incorporation are not necessarily in- "consistent with the provincial law of mortmain, which "does not absolutely prohibit corporations from acquiring "or holding lands, but only requires, as a condition of "their so doing, that they should have the consent of the "Crown. If that consent be obtained, a corporation does "not infringe the provincial law of mortmain by acquiring "and holding lands. What the Act of incorporation has "done is to create a legal and artificial person with capacity "to carry on certain kinds of business, which are defined, "within a defined area, viz., throughout the Dominion. "Among other things, it has given to the association power "to deal in land and buildings, but the capacity so given "only enables it to acquire and hold land in any province "consistently with the laws of that province relating to "the acquisition and tenure of land."

1954 A.C. p. 578.

Similar propositions were laid down in *Great West Saddlery Co. Ld.* v. *The King*,[8] where the gist of the decision may be taken from the headnote where it says: "A company "incorporated by the Dominion under the Companies Act

[6] 9 App. Cas. 157, 165.

[7] Ibid. 166.

[8] [1921] 2 A.C. 91; 37 T.L.R. 436.

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"of Canada . . . with power to trade in any province may, "consistently with sections 91 and 92 of the British North "America Act, 1867, be subject to provincial laws of general "application, such as laws imposing taxes, or relating to "mortmain or requiring licences for certain purposes, or "as to the form of contracts."

For the same reasons it was held in *Lymburn* v. *Mayland*[9] that a provision prohibiting the selling of the shares of Dominion companies was not ultra vires provincial legislation inasmuch as it did not preclude them from selling their shares unless they were registered but merely subjected them to competent provisions applying to all persons trading in securities.

Both the latter cases, however, are careful to point out that legislation will be invalid if a Dominion company is sterilized in all its functions and activities or its status and essential capacities are impaired in a substantial degree. What provisions have the effect of sterilizing all the functions and activities of a company or impair its status and capacities in an essential degree will, of course, depend on the circumstances of each case, but in the present instance their Lordships cannot have any doubt but that the Act or the licence or both combined do have such an effect on Mr. Winner's undertaking in its task of connecting New Brunswick with both the United States of America and with the province of Nova Scotia.

Nor indeed, whatever may be said of the Act, is the licence a provision applying to all persons. It is a particular provision aimed at preventing Mr. Winner from competing with local transport companies in New Brunswick.

But, it is contended, there are two rights—that of the Dominion and that of the province—one giving power to the one body and the other to the other, and enabling Dominion or province to pass legislation dealing with its own topic: the province with its roads and the Dominion with connecting undertakings. So long as the Dominion has not, as it has not, passed legislation dealing with the matter, the powers overlap and the province is entitled to enact its own provisions which, unless and until the Dominion deals with the matter, are valid and enforceable. This argument does not appear to have been presented to the courts in Canada and their Lordships do not agree with it.

1954 A.C. p. 579.

[9] [1932] A.C. 318, 324; 48 T.L.R. 231.

The province has indeed authority over its own roads, but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking, not the roads, which comes within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.

Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict inter-provincial traffic. As their Lordships have indicated, this does not in any way prevent what is in essence traffic regulation, but the provisions contained in local statutes and regulations must be confined to such matters.

In the present case they are not so confined. They do not contain provisions as to the use of the highways—they are not even general regulations affecting all users of them. They deal with a particular undertaking in a particular way and prohibit Mr. Winner from using the highways except as a means of passage from another country to another State. It does not indeed follow that a regulation of universal application is necessarily unobjectionable—each case must depend upon its own facts—but such a regulation is less likely to offend against the limitation imposed on the jurisdiction of the province inasmuch as it will deal with all traffic and not with that connecting province and province. The question as their Lordships see it, and indeed as it was argued, raises the hackneyed consideration what is the pith and substance of the provision under consideration. Is it in substance traffic regulation or is it an interference with an undertaking connecting province and province? Their Lordships cannot doubt but that it was the latter. It obviously sought to limit activities of an undertaking connecting the State of Maine with New Brunswick and New Brunswick with Nova Scotia. It was not mere regulation of road traffic. It is true that the distinction between the jurisdiction of the Dominion and that of a province may be a fine one, as appears from a comparison of two cases, viz., *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours*[10] and *Madden* v. *Nelson and Fort Sheppard Railway.*[11] But except to call attention to the

1954 A.C. p. 580.

[10] [1899] A.C. 367.

[11] [1899] A.C. 626; 15 T.L.R. 484.

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fact that each case must depend on an exact examination of its own facts those decisions are not directly relevant to any point which their Lordships have to decide.

In their Lordships' opinion the action of the province was an incursion into the field reserved by the British North America Act to the Dominion. In coming to this conclusion their Lordships refrain from deciding whether the Act or the regulations or both are beyond the powers of the province. It may be that the Act can be so read as to apply to provincial matters only. If this be so, the licence given to Mr. Winner is an unauthorized limitation of his rights, because it is for the Dominion alone to exercise either by Act or by regulation control over connecting undertakings. On the other hand, it may be that the Act itself must be construed as interfering with undertakings connecting province with province or with another country. In either case the province, either through the Act itself or through the licence issued in pursuance of regulations made under the Act, has exceeded its jurisdiction. The licence, indeed, may be good as a licence, but the limitation imposed in it is ultra vires *and of no effect.*

There remains, however, the further question whether, although the licence cannot be limited in the manner imposed by the board, Mr. Winner can, nevertheless, as the Supreme Court adjudged, be prohibited from taking up and setting down purely provincial passengers, i.e., those whose journey both begins and ends within the province. So far as their Lordships are able to judge, none of the parties and none of the interveners suggested such a compromise in any of the courts in Canada.

Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

The Supreme Court, however, approached the question from a different angle. To them a distinction should be drawn between what was an essential and what an incidental portion of the enterprise. In their view the portion which

1954 A.C. p. 581.

could be shed without putting an end to it did not constitute an essential part of the undertaking and, therefore, could be dealt with by the province, leaving only the essential part for the Dominion's jurisdiction.

Their Lordships are of opinion that this method of approach results from a misapprehension of the true construction of section 92 (10) (*a*) of the British North America Act. The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

The view of the Supreme Court is succinctly put by Rand J. when he says [12]: "Assuming, then, that the inter-national "and inter-provincial components of Winner's service are "such an undertaking as head 10 envisages, the question is "whether, by his own act, for the purposes of the statute, "he can annex to it the local services. Under the theory "advanced by Mr. Tennant, given an automobile, an "individual can, by piecemeal accumulation, bring within "paragraph 10 (*a*) a day-to-day fluctuating totality of "operations of the class of those here in question. The "result of being able to do so could undoubtedly introduce "a destructive interference with the balanced and co-"ordinated administration by the province of what is "primarily a local matter; and the public interest would "suffer accordingly. There is no necessary entirety to "such an aggregate and I cannot think it a sound con-"struction of the section to permit the attraction, by such "mode, to Dominion jurisdiction of severable matter that "otherwise would belong to the province."

No doubt the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking, but so to treat the question is not to ask is there an undertaking and does it form a connexion with other countries or other provinces, but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as inter-provincial and the other part as provincial.

[12] [1951] S.C.R. 887, 924.

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1954 A.C. p. 582.

The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.

The contention is clearly dealt with by the observations of the Board in the *Bell Telephone* case,[13] observations in the following words, which, in their Lordships' opinion, have a direct application to the present case: "It was argued that "the company was formed to carry on, and was carrying "on, two separate and distinct businesses—a local business "and a long-distance business. And it was contended that "the local business and the undertaking of the company so "far as it dealt with local business fell within the jurisdiction "of the provincial legislature. But there, again, the "facts do not support the contention of the appellants. "The undertaking authorized by the Act of 1880 was one "single undertaking, though for certain purposes its "business may be regarded as falling under different "branches or heads. The undertaking of the Bell Tele-"phone Company was no more a collection of separate and "distinct businesses than the undertaking of a telegraph "company which has a long-distance line combined with "local business, or the undertaking of a railway company "which may have a large suburban traffic and miles of "railway communicating with distant places. The special "case contains a description of the company's business "which seems to be a complete answer to the ingenious "suggestion put forward on behalf of the appellants."

In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is inter-provincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case,

[13] [1905] A.C. 52, 59; 21 T.L.R. 45.

so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or regulation.

Of course, as has so often been pointed out, whether upon the evidence adduced an activity can be adjudged to be local is a matter of law, but once it is decided that it can be local the question whether it is so is one of fact for the relevant tribunal to determine. In the case under consideration no such question arises, the undertaking is one connecting the province with another and extending beyond the limits of the province and therefore comes within the provisions of section 92 (10) (*a*) and is solely within the jurisdiction of the Dominion.

One note of warning should, however, be sounded. Their Lordships express no opinion whether Mr. Winner could initiate a purely provincial bus service even though it was under the aegis of and managed by his present organization. No such question, however, arises or has been raised.

As it is, their Lordships will humbly advise Her Majesty (1) that the appeal of the Attorneys-General for Ontario, Alberta and Prince Edward Island ought to be dismissed; (2) that the appeal of Israel Winner, Canadian National Railway Company and Canadian Pacific Railway Company ought to be allowed; (3) that the order of the Supreme Court ought to be varied by substituting the following answer to such parts of the questions submitted as it considered it was necessary to answer for the disposal of the issues properly raised in the pleadings: "1. It is not within the "legislative powers of the province of New Brunswick by "the statutes or regulations in question, or within the "powers of the Motor Carrier Board by the terms of the "licence granted by it, to prohibit the appellant by his "undertaking, as described in paragraph 9, sub-paragraphs "(*a*), (*g*), (*h*) and (*j*) of the facts set out in the order of "Hughes J. dated January 17, 1950, from bringing pas-"sengers into the province of New Brunswick from outside "the said province and permitting them to alight, or from "carrying passengers from any point in the province to a "point outside the limits thereof, or from carrying passen-"gers along the route traversed by its buses from place to "place in New Brunswick"; (4) that the order of the Supreme Court as to costs ought to stand save that it should

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be varied by giving Israel Winner the whole instead of two-thirds of his costs of the appeal to the Supreme Court. The costs incurred by Israel Winner in the consolidated appeals to this Board are to be paid by the Attorneys-General for Ontario, Alberta and Prince Edward Island.

Solicitors: *Lawrence Jones & Co.*; *Blake & Redden*; *Gard, Lyell & Co.*; *Charles Russell & Co.*; *Norton, Rose, Greenwell & Co.*; *Burchells.*

ATTORNEY-GENERAL FOR SASKATCHEWAN.....	APPELLANT;	J.C.* 1953 *July 6.*
AND		1953 A.C. p. 594.
CANADIAN PACIFIC RAILWAY COMPANY.....	RESPONDENT;	
AND		
ATTORNEY-GENERAL FOR MANITOBA AND OTHERS.....	INTERVENERS.	

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Saskatchewan)—Business tax—Canadian Pacific Railway—Construction contract—Exemption of property from taxation—Implementing legislation—Constitutional validity—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92 (2)—British North America Act, 1871 (34 & 35 Vict. c. 28), s. 2—Saskatchewan Act, 1905 (S.C.) (4 & 5 Edw. 7, c. 42), s. 24—City Act, 1947 (S.S.) (11 Geo. 6. c. 43, as amended).

By clause 16 of a contract, executed on October 21, 1880, between the Canadian Government and the contractors (who were to constitute the Canadian Pacific Railway Company), providing for the construction, operation and maintenance of the Canadian Pacific Railway, the contract being scheduled to and approved and ratified by an Act of the Canadian Parliament of 1881 under which the Canadian Pacific Railway Company was created, it was provided, inter alia, that "the Canadian Pacific "Railway, and all stations and station grounds, workshops, buildings, "yards and other property, rolling stock and appurtenances required "and used for the construction and working thereof, and the capital "stock of the company, shall be forever free from taxation by the Dom-"inion, or by any province hereafter to be established, or by any municipal "corporation therein; . . ."

In 1905 the Province of Saskatchewan, which was carved out of Rupert's Land and the North-West Territories, which had become part of Canada in 1868, was established by the Saskatchewan Act, 1905, of the Dominion Parliament, passed pursuant to the powers conferred by the British North America Act, 1871, which, by section 2, empowered the Parliament of Canada when establishing new provinces to make provision, inter alia, "for the passing of laws for the peace, order and good government of "such province." In purported compliance with its obligations under clause 16 of the contract of 1880, the Dominion Parliament provided in section 24 of the Saskatchewan Act of 1905 that "the powers hereby "granted to the said Province shall be exercised subject to the provisions "of section 16 of the contract."

The question having been raised whether the Canadian Pacific Railway Company was, by virtue of clause 16 of the contract and section 24 of the Act of 1905, free from the "business tax" imposed by the City Act, 1947, of Saskatchewan—assessed at a rate per square foot of the floor space of each building used for the purposes of its business in the Province—it 1953 A.C. p. 595.

* *Present:*—VISCOUNT SIMON, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

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was contended by the Province, first, that the authority granted to the Dominion Parliament by section 2 of the British North America Act, 1871, to make provision "for the passing of laws for the peace, order, and "good government of" the Province, was limited to the granting to the Province of the identical taxing powers conferred on the original four Provinces of Canada by section 92 (2) of the British North America Act, 1867—which provided that the provincial legislatures had exclusive power to make laws in relation to "direct taxation within the Province "in order to the raising of a revenue for Provincial purposes"—and that no fetter on the power of taxation by Saskatchewan was permitted. It was contended, secondly, that the business tax was imposed on persons and companies carrying on a business, and not upon their property or upon their ownership or user of property:—

Held, first, that the words "peace, order, and good government" in section 2 of the Act of 1871 were of very wide import, and that a legislature empowered to pass laws for such purposes had a very wide discretion. There was no set pattern of "a Province" in the Act of 1867, and a Dominion Act constituting a new Province might depart from the strict 1867 pattern, and might prescribe what laws could be passed by the Province, and accordingly section 24 of the Saskatchewan Act of 1905 imposing the limitation that the powers of the Province should be exercised subject to the provisions of clause 16 of the contract of 1880 was validly enacted.

Reference re Constitutional Validity of Section 17 of the Alberta Act [*1927*] S.C.R. 364 approved.

Held, secondly, that the business tax was imposed on the owner of things which he was using in his business, and that the exemption in clause 16 of the contract operated to relieve the railway company from the tax. Where, as here, the measure of the tax was the extent of the taxpayer's property used in his business, and that property when so used was "forever free from taxation," the tax so measured could not be regarded as something lying outside the exemption.

City of Halifax v. *Fairbanks' Estate* [*1928*] A.C. 117; 44 T.L.R. 5 considered

Judgment of the Supreme Court of Canada [1951] S.C.R. 190 affirmed.

APPEAL (No. 21 of 1952), by special leave, from a judgment of the Supreme Court of Canada (November 20, 1950) allowing in part an appeal by the present respondent from a judgment of the Court of Appeal for Saskatchewan (January 29, 1949).

The following introductory statement is taken substantially from the judgment of the Judicial Committee: The Court of Appeal had before it four questions referred to it by an order of the Lieutenant-Governor in Council, dated November 16, 1948, pursuant to the Constitutional Questions Act (chapter 72 of the Revised Statutes of Saskatchewan, 1940). Those questions involved consideration of the interpretation of clause 16 of a contract executed on October 21, 1880, between the Canadian Government and contractors who were to constitute the Canadian Pacific Railway

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Company. The contract provided for the construction, operation and maintenance of the Canadian Pacific Railway.

The respondent company was created under the authority of a statute of Canada enacted in 1881 (44 Vict. c. 1), to which the contract was scheduled, and section 1 of the statute approved and ratified the contract.

Clause 16 of the contract was as follows: "The Canadian "Pacific Railway, and all stations and station grounds, work- "shops, buildings, yards and other property, rolling stock "and appurtenances required and used for the construction "and working thereof, and the capital stock of the company, "shall be forever free from taxation by the Dominion, or by "any province hereafter to be established, or by any muni- "cipal corporation therein; and the lands of the company, "in the North-West Territories, until they are either sold "or occupied, shall also be free from such taxation for 20 "years after the grant thereof from the Crown."

The Province of Saskatchewan was established in 1905 by the Saskatchewan Act of the Dominion Parliament (4 & 5 Edw. 7, c. 42), passed pursuant to section 2 of the British North America Act, 1871, which provided: "The Parliament "of Canada may from time to time establish new Provinces "in any territories forming for the time being part of the "Dominion of Canada, but not included in any Province "thereof, and may, at the time of such establishment, make "provision for the constitution and administration of any "such Province, and for the passing of laws for the peace, "order, and good government of such Provinces, and for its "representation in the said Parliament." Section 24 of the Act of 1905 read as follows: "The powers hereby granted to "the said Province shall be exercised subject to the provi- "sions of section 16 of the contract set forth in the schedule "to chapter 1 of the Statutes of 1881, being an Act respecting "the Canadian Pacific Railway Company."

The Order in Council granting special leave to appeal to the Privy Council limited the appeal to the following questions: "(*a*) As to the validity of the limitation of the "powers of the Province contained in section 24 of the "Saskatchewan Act, 1905; and (*b*) whether the exemption "granted in clause 16 of the contract covers the form of "local taxation known as 'business tax' [imposed by the City "Act, 1947, of Saskatchewan]."

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The Court of Appeal for Saskatchewan (Martin C.J., MacDonald and Procter JJ.) answered the questions referred to it in favour of the present appellant. Their decision was reversed in part by a majority decision of the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ).

1953. May 4, 5, 6, 7, 11, 12 and 13. *E. C. Leslie Q.C.*, *R. S. Meldrum Q.C.* and *P. G. Makaroff* (all of the Canadian Bar) for the appellant. The first submission—on a constitutional question which was not argued in the Supreme Court—is that when, pursuant to the powers conferred by section 2 of the British North America Act, 1871, the Dominion Parliament enacted the Saskatchewan Act of 1905 setting up the Province of Saskatchewan, they had no power to impose a constitutional limitation upon the right to taxation which is ordinarily possessed by the Canadian Provinces under section 92 of the British North America Act, 1867. The appellant has to satisfy the Board that section 24 of the Act of 1905 was ultra vires the Dominion Parliament. In the *Reference re Constitutional Validity of Section* 17 *of the Alberta Act*[1] the Supreme Court of Canada expressed the opinion that the Act of 1871, by section 2, authorized the Parliament of Canada to vary the provisions of the British North America Act, 1867, in so far as any new Province was concerned. Newcombe J., in giving the judgment of the court, said that section 2 of the Act of 1871 gave the Dominion Parliament the widest powers with respect to defining the powers of the new Province, and he stated that[2]: "It "would be strange indeed if, when the new Provinces "emerged, constitutional guarantees could not be afforded "by a law-making body which had the powers of the Imperial "Parliament to legislate for their constitution and admin-"istration, and to define their powers to pass laws for their "peace, order and good government . . . . It is, I "think, as impossible as it is inexpedient to cast any doubt "upon the generality and comprehensive nature of constitu-"tional powers conferred for peace, order and good govern-"ment, and I do not find, either in the British North America
1953 A.C. p. 598. "Act, of 1867 or of 1871, anything expressed or implied "which limited the power of the Parliament of Canada in

[1] [1927] S.C.R. 364.

[2] Ibid. 373.

"1905 to define the constitution and powers of the Provinces "which were at that time established." The appellant does not question the result which was reached in that case, but rejects as incorrect the reasoning by which that result was supported.

The Dominion Parliament did not have the right to impose that constitutional fetter on the Province in passing section 24 of the Act of 1905. Section 146 of the British North America Act, 1867, provides for the admission of other Provinces and Rupert's Land subject to the provisions of that Act, and the Rupert's Land Act, 1868, provided for Rupert's Land being admitted under section 146. Section 3 of the British North America Act, 1886, expressly provides that: "This Act and the British North America Act, 1867, "and the British North America Act, 1871, shall be con- "strued together . . ." When new Provinces were established, they could only be established subject to the provisions of the British North America Act, 1867, and the provisions for the distribution of legislative power as between the Dominion and the Provinces contained in sections 91, 92, 93 and 95 of that Act would apply to any new Province. The position of a new Province was the same as that of the original Province unless it was altered in express terms. Section 24 of the Saskatchewan Act, 1905, is inconsistent with heads 2 and 8 of section 92 of the Act of 1867, under which the Province was given exclusive legislative power in relation respectively to "direct taxation within the Province "in order to the raising of a revenue for provincial purposes" and "municipal institutions in the Province," and is therefore ultra vires. The reasoning in the *Alberta Reference* case[1] was wrong for the reason that it would be at least extremely unlikely that one or more Provinces of Canada should have different legislative powers than the others. There is no decision in point here, but reference may be made to *In re The Initiative and Referendum Act*.[3] Saskatchewan is entitled to the same legislative powers as any other Province. The Dominion Parliament had no power to vary the provisions of the British North America Act, 1867, by inserting section 24 into the Act of 1905.

It is a fallacy to treat the word "constitution" in section 2 of the Act of 1871 as including the distribution of legislative

[1] [1927] S.C.R. 364.

[3] [1919] A.C. 935, 941.

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powers between the Provinces and the Dominion. "Constitution" as used in section 2 means only the setting up of the province and the form of government which it will have or, rather, the instruments—such as the Lieutenant-Governor, the Legislative Assembly and the Executive Council—by which the administration of the new Province can be carried on. It is in the latter sense that the word is used in the British North America Act, 1867, and as that Act is to be construed with the Act of 1871 by the express provision in the Act of 1886, "constitution" must be given the meaning given to it in the Act of 1867. [Reference was made to *In re Transfer of Natural Resources to Saskatchewan*.[4]]

Section 4 of the Act of 1871 did not authorize the Dominion to enter into a contract with the Canadian Pacific Railway providing for a tax exemption to be binding on future Provinces and municipalities therein. Once a Province is established, then so far as the distribution of legislative powers is concerned it receives the same powers as the other Provinces, and there is no power in the Dominion Parliament to place a fetter on the powers under section 92 or any other power. Under the decision in the *Alberta Reference* case,[5] not only could the Dominion in setting up the new Province subtract from it powers which the Province would ordinarily have under section 92 of the Act of 1867 but it could give to it powers which were assigned by that Act to the Dominion under section 91, and if that were done there would be a legitimate cause for complaint on the part of the other Provinces. That is a factor indicating that the construction for which the appellant contends should be given to the Act. Lastly, on this constitutional point, the respondents say that whether or not the Act of 1905 could have been validly passed under section 2 of the Act of 1871, it was prospectively ratified by the British North America Act, 1886. It is submitted that the Act of 1886 is controlled by its context, and should be read bearing in mind its purpose: Maxwell on Interpretation of Statutes, 9th ed., p. 46; Craies on Statute Law, 5th ed., pp. 41, 182-4.

Summarizing the argument on the constitutional point: (1) The British North America Act, 1867, provided for a

[4] [1932] A.C. 28, 39; 48 T.L.R. 24. [5] [1927] S.C.R. 364.

confederation of the Provinces with equal legislative powers. (2) The original union was not conceived as of one limited to the original Provinces. Section 146 of the Act of 1867 shows clearly that it was the intention that the Dominion should grow and that new Provinces should be added to it, but each having the same legislative powers. There is no suggestion in the Act of 1871 that the new Provinces were to have different legislative powers from the other Provinces. (3) The Act of 1871 is in pari materia with the Act of 1867 and must be construed with it, and that would be true even apart from the express provisions of section 3 of the Act of 1886. (4) The exemption provided in clause 16 of the contract was ultra vires ab initio and could not therefore be made binding on Saskatchewan by section 24 of the Act of 1905.

If the appellant is right on the constitutional question the point of construction on the applicability of the business tax provisions will not arise. Under the City Act, 1947, the basis of the business tax is a certain rate on an assessment at so much per square foot of the premises used. The profits of the business are not taken into consideration in assessing to business tax. All the same businesses are assessed at the same rate in all parts of the city. *City of Moose Jaw* v. *British American Oil Co. Ld.*[6] deals with the distinction between a tax in rem and a tax in personam. The majority judgments in the Supreme Court held that this business tax is a tax on the use or occupation of property, and therefore comes within the exemption in clause 16. It is submitted that in substance it is not a tax on the use or occupation of property, but is a tax imposed on a person carrying on business in a municipality in respect of his carrying on business, and that the basis of the assessment, that is, the area of the building which he uses, is a measure or yardstick of the business tax. Where a professional man, for example, gave up practice but remained in occupation of the same premises, the business tax would be payable only while he was in business; also a trespasser, or other person without any interest in the property at all, would be liable for the business tax if he was using the premises for business purposes. The respondents relied below on *City of Halifax* v. *Fairbanks' Estate.*[7] That case, however, does not carry

[6] [1937] 2 W.W.R. 309, 313-4.

[7] [1928] A.C. 117; 44 T.L.R. 5.

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one very far on the question whether this business tax is a tax on property or not. The real question in that case was whether the tax was direct or indirect; there is no doubt that it was a tax on property.

Even assuming that a business tax is a tax on "property," it is not the kind of property which is exempted from taxation by clause 16 of the contract. The exemption in that clause is limited to tax on the right of way, station grounds and rolling stock on the main line, and the capital stock of the company. If it had been intended to exempt the company from taxation such as income tax and business tax it would have been a simple matter expressly to have provided for such exemptions: *Canadian Northern Pacific Railway* v. *New Westminster Corporation*.[8] In no circumstances can clause 16 be extended to include a business tax.

E. C. Leslie Q.C. I also appear for the Attorney-General for the Province of Alberta, intervener, who adopts and supports the case for the Attorney-General for Saskatchewan and submits that this appeal should be allowed.

Viscount Hailsham Q.C. for the Attorney-General for Manitoba, intervener, who supported in substance the case for the appellant. Considering first the constitutional point, unless section 24 of the Act of 1905 can be justified under the Act of 1871 or by so-called anticipatory validation by the Act of 1886, then the fetter imposed by section 24 must fall to the ground, for the reason that the Dominion Parliament may have the right under the Act of 1867 to create new Provinces, but if it did, then the Provinces so created could only be created under section 146, and any creation by virtue of that section would have to be subject to the Act of 1867, and, amongst other things, to section 92 (2), which assigns direct taxation within the Province as a matter exclusively within the sphere of the provincial legislature. Therefore the question which arises can be put in the form of two questions: (1) Can the fetter imposed by section 24 be justified under the Act of 1871; and (2), if not, can it be validated under the Act of 1886?

The purpose of the Act of 1871 was the establishment of Provinces and provision for their representation in Parlia-

[8] [1917] A.C. 602, 605.

ment. There is nothing in the power entitling the Dominion Parliament to establish a new Province to permit anything of the kind which is done by section 24 of the Act of 1905. What Parliament is entitled to establish is a Province, and "province" means an entity having the rights, jurisdiction, liabilities and duties of a Province under the Act of 1867. It cannot be within the power of the Dominion Parliament to withhold from a new Province the power to impose direct taxation. Unless the fetter imposed by section 24 of the Act of 1905 can be brought within "constitution" or "administration" or "passing of laws for the peace, order, and "good government" in section 2 of the Act of 1871, it cannot be imposed at all; there is no other compartment for it to fit into.

The natural meaning of "constitution" is the constitutional organs of the Province—Lieutenant-Governor, Upper and Lower Houses, etc. The constitution of the Province established by the Dominion Parliament is capable thereafter of amendment by the provincial legislature under section 92 of the Act of 1867, except as regards the office of the Lieutenant-Governor. "Constitution" does not entitle the Dominion to impose a fetter which could not be removed by the Province. Similarly, there is nothing in the "administration" of the Province which is not in fact within the jurisdiction of the Province after it is established.

1953 A.C. p. 602.

With regard to the "passing of laws for the peace, order, "and good government"; in relation to matters which are to be within the exclusive jurisdiction of the Province once it is established, all that the Dominion needs to do is to set up the necessary machinery, and it has then made provision for the passing of laws for the peace, order, etc., in one particular. But there will be a number of other subjects, which are admittedly not within the jurisdiction of the Province, in respect of which the Dominion has itself to make laws under section 91 of the Act of 1867 so far as may be necessary at the time of the creation of the Province. But the Dominion may not legislate after the creation of the Province for things which are exclusively within the power of the Province. The expression "peace, order, and good government" covers the totality of the legislation for the area. The fetter in section 24 is ultra vires. In any case the imposition of such a fetter required the concurrence of the

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Imperial Parliament, and that was so even as late as the Alberta Resources Act of 1930. The machinery then employed by the British North America Act, 1930, consisted in the confirmation of various agreements, and in the case of Alberta and Saskatchewan an express clause was inserted fettering the use which the Province could make of the transferred resources in such a way that they had to follow, in cases where the legislation would otherwise be within the exclusive jurisdiction of the Province, the terms of any contract which had been made by the Dominion before the transfer. Also, the Imperial Act of 1939 (12, 13 & 14 Geo. 6, c. 81), which introduced amendments of the British North America Act, 1867, shows that even after the Statute of Westminster that was done in a way which makes it plain that the Dominion Parliament is not given power to abridge the exclusive jurisdiction of the Province under section 92 of the Act of 1867, and they do not possess that right even to this day.

1953 A.C. p. 603.

If it be right that at the time of the creation of the Province it was intended that it should be lawful for the Dominion Parliament to impose any fetter it liked irrevocably, it could have been clearly expressed. If the Imperial Parliament had said so in terms, that would have been an end of the matter. The words "peace, order, and "good government" do not entitle the Parliament of Canada to redistribute the legislative functions between Canada and the Provinces. It all comes back to the construction of section 2 of the Act of 1871. The words in section 24 of the Act of 1905 which purport to impose a fetter on the provincial legislature as to what it can do and the way in which it can do it are not such as fetter that Parliament in 1948 in imposing a tax which ex hypothesi is in contravention of clause 16 of the contract. Section 2 of the Act of 1871 only carries out the purpose of the Act as defined in the preamble, and the words "pass laws for the peace, order, and good govern- "ment" ought not to be read as going outside the original purposes at all. What is contemplated by that phrase is the activities of a future provincial legislature established under the section. The words have to be construed with relation to the objects actually nominated in the phrase, and that clearly would not extend extraterritorially. The words are apt to give the widest legislative authority, but

limited to the territory: the *Alberta Reference* case[9]; *Riel* v. *The Queen*[10]; *Croft* v. *Dunphy*.[11] There is something repugnant in saying that the Province shall have the powers given by section 92 of the Act of 1867, but that it shall only exercise them in a particular way. There is a discussion of the meaning of the words "for the peace, order," etc., in Constitutional Laws of the Commonwealth, by Jennings and Young (1952), pp. 46-8, where a number of authorities are set out: *The Queen* v. *Burah*[12]; *Hodge* v. *The Queen*[13]; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*.[14] *The Queen* v. *Burah* [15] only says that Parliament has the power to confer the widest possible powers on a subordinate legislature. From *Hodge* v. *The Queen* [16] it would appear that the Dominion can never impose a fetter on the manner in which a Province, once created, is to exercise its exclusive jurisdiction.

On the second point—the construction of clause 16 of the contract—the words to be construed are "forever free from "taxation." The submission, basically, is that the property is free from taxation when there is no tax imposed on the owner—the legal owner—as owner of the property. It is the property which is or is not to be free from taxation. There is a line of cases in respect of the exemption under section 125 of the British North America Act, 1867, from which it is sought to draw an analogy. In *Smith* v. *Vermillion Hills Rural Council*,[17] *City of Montreal* v. *Attorney-General for Canada*[18] and *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5*[19] a tax on the land for the purposes of that exemption was limited in the strictest possible sense to a tax on the ownership of land, and not a tax on some interest which was smaller than the full ownership of the land. Applying that to the present case, when the area is made the basis of the business tax, it is only the yardstick of a tax which is quite different from a tax on the land. See also *City of Halifax* v. *Fairbanks' Estate*.[20] Another analogy is from English law: if this immunity in

1953 A.C. p. 604.

[9] [1927] S.C.R. 364, 371.
[10] (1885) 10 App. Cas. 675, 678.
[11] [1933] A.C. 156; 48 T.L.R. 652.
[12] (1878) 3 App. Cas. 889.
[13] (1883) 9 App. Cas. 117, 131-2.
[14] [1892] A.C. 437, 441-3; 8 T.L.R. 677.
[15] 3 App. Cas. 889.
[16] 9 App. Cas. 117.
[17] [1916] 2 A.C. 569, 573; 32 T.L.R. 684.
[18] [1923] A.C. 136, 142-2; 39 T.L.R. 17.
[19] [1951] A.C. 786.
[20] [1928] A.C. 117; 44 T.L.R. 5.

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clause 16 had been conferred by an English Act it would not have conferred immunity from Sch. A income tax. The business tax is not a tax on property; the standard by which it is measured is no more than a yardstick by which the tax is established. *London County Council* v. *Attorney-General*[21] is the locus classicus on this matter, and is a strong authority for the proposition that an English Sch. A income tax, notwithstanding that it is directly charged on the annual value of the land, is not a tax on property, but a tax on something quite different—a tax on income. Admittedly, a business tax is not a tax on income; it is a tax on businesses; but neither it nor the Sch. A tax is a tax on land.

What has to be considered for the purpose of determining whether the business tax comes within the terms of the exemption or not is not the method of measure but the nature of the tax itself, and if it is a tax on the business and not on the property, then the property is free from tax. There is nothing in the clause to exempt from anything else but property tax. The correct approach to the construction of clause 16 is that "as taxation is the rule and exemption "the exception, the intention to make an exemption ought "to be expressed in clear and unambiguous terms": *Rex* v. *School District No. 1, Parish of Madawaska, Edmundston.*[22] If the Canadian Pacific Railway Company claim to be exempt from provincial or municipal taxes which other people have to pay, they must show clearly words entitling them to be so: *Fry* v. *Salisbury House Estate Ld.*[23]

1953 A.C. p. 605.

C. F. H. Carson Q.C. (of the Canadian Bar), *Gahan Q.C.* and *Allan Findlay* (of the Canadian Bar) for the respondent the Canadian Pacific Railway Company. On the constitutional issue the important words for construction are "and may. . . . make provision . . . for the pass-"ing of laws for the peace, order, and good government of "such Provinces" in section 2 of the Act of 1871. There are two conflicting contentions. The appellant submits that those words enable the Parliament of Canada to do one thing, and one thing only, and that is to provide for the machinery for the local legislature to work, and that the Dominion Parliament has no power whatever to make provision for what laws were to be passed by such Province.

[21] [1901] A.C. 26, 35; 17 T.L.R. 131.
[22] (1919) 49 D.L.R. 371, 374.
[23] [1930] A.C. 432, 441; 46 T.L.R. 336.

The respondent's contention is that the power given to the Dominion Parliament to make provision for the passing of laws for the peace, order, and good government of the newly established Province is the same power which the Imperial Parliament itself exercised under sections 91 and 92 and a large number of other sections in the Act of 1867 making provision for the passing of laws by the Parliament of Canada. By sections 91 and 92 and later sections the Imperial Parliament had the totality of laws and made provision for which laws were to be passed by the Parliament of Canada and which were to be passed by the four Provinces when established.

By section 2 of the Act of 1871 the Imperial Parliament gave to the Dominion Parliament power to make similar provisions in the case of new Provinces, that is to say, to take the totality of laws and make provision for which laws were to be passed by the Parliament of Canada and which by the legislature of the newly established Province. If Parliament is not permitted to dispute the legislative power, the totality of the laws must be committed to the new Province. The words "peace, order, and good government" confer the widest power to make laws on any subject-matter: *Riel* v. *The Queen*.[24] Section 146 of the Act of 1867 is not in any way relevant to the question of the powers of the Parliament of Canada under the Act of 1871. The terms and conditions which the Queen approved under section 146 should in no way alter any provisions of the Act of 1867, which provisions only applied to the four original Provinces. Section 146 did not prevent the provisions of the Act of 1867 being adopted either with or without modification when a new Province was brought in under section 146: the *Alberta Reference* case.[25] Section 2 of the Act of 1871 conferred on the Parliament of Canada power to impose a limitation on the legislative authority of new Provinces different from the limitations that were imposed on the four original Provinces by the Act of 1867. If that is right, the Dominion Parliament clearly had power to limit the taxing power of the legislature of Saskatchewan under section 24 of the Act of 1905.

1953 A.C. p. 606.

Further, under section 92 (10) (*a*), read with section 91 (29) of the Act of 1867, the jurisdiction in relation to railways

[24] 10 App. Cas. 675.

[25] [1927] S.C.R. 364, 369.

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was assigned to the Parliament of Canada. Unquestionably, that Parliament had power to enact the statute of 1881, which in terms ratified the contract containing clause 16, and accordingly the terms of the contract are of the character of railway legislation and within the competence of the Dominion Parliament. It is clear that to get the trans-continental railway under way it was essential to give concessions, including the tax exemption. Then in 1905 the Parliament of Canada enacted section 24 implementing the obligation which it had already incurred under clause 16. Under the "railway" head the Dominion could clearly legislate in relation to this railway, including in relation to taxation of it. Essentially section 24 is in relation to railways, and it was competent for the Dominion Parliament in 1905 to implement its obligation under the contract giving tax exemption by enacting section 24.

On the second issue, clearly clause 16 of the contract protects the respondent company from taxation in respect of property used for the working of the railway, which was to be, and is, the business of this company—it protects the company in respect of taxation on property used for its business. It cannot be said to be so protected if it is required to pay the taxes in question in this case. Clause 16 was a term of a contract between the Dominion and the railway company, and with that in mind, if in the following year, 1882, the Parliament of Canada had imposed a tax on the company, calling it a business tax, and providing that it was to be in respect of its business but measured by the area of the property used for business purposes, it could not be said that such a tax was not within the exemption. The obvious purpose of clause 16 was to protect the company against being burdened by taxation which might impair its ability to fulfil its obligation to run the railway efficiently for ever. It has also to be borne in mind that the tax would have to be paid irrespective of whether the company made a profit. The words "capital stock" were inserted in clause 16 to protect the company against such a tax as was considered in *Bank of Toronto* v. *Lambe*.[26] What was said in *City of Halifax* v. *Nova Scotia Car Works Ld.*[27] regarding the sort of taxes which came within the exemption is applic-

1953 A.C. p. 607.

[26] (1887) 12 App. Cas. 575; 3 T.L.R. 742.

[27] [1914] A.C. 992, 995.

able here so far as the respondent company is concerned. The exemption in clause 16 is in respect of property used in the working of the railway. As to why it is called a business tax, see *Dominion Express Co.* v. *City of Brandon*.[28] The tax here, while labelled a business tax, is essentially an occupancy tax. If it were a business tax in the strict sense one would have expected it to bear some relation to the earnings of the business, and that is not so here. Further, the tax here would include many people who are not normally regarded as carrying on business; and also it is not imposed on all persons carrying on business, but only on those persons who use property. This so-called business tax applies to business property only; and in addition the Act provides for the imposition of what is called a house-holder's tax: section 486; and that tax, like the business tax, is imposed on persons in respect of their occupation of property, but for residential purposes.

It is clear that the parties intended the exemption in clause 16 to cover all types of taxes on or in respect of property. The exemption provisions should be construed as protecting the company not only from the types of property taxes in existence in 1881 but also from all types of property taxes which have come into existence since that time: *Associated Newspapers Ld.* v. *City of London Corporation*.[29] If, as the appellant contends, clause 16 does not exempt the company from taxes which, it is submitted, are essentially in respect of its use or occupation of property, the benefits which were intended to be conferred by clause 16 would be lost.

W. R. Jackett Q.C. (of the Canadian Bar) for the Attorney-General for Canada, intervener, arguing only on the question of the validity of section 24 of the Saskatchewan Act of 1905, supported the argument for the respondent company and submitted that section 24 was valid and operated to limit the legislative powers of the Province.

1953 A.C. p. 608.

E. C. Leslie Q.C. in reply. It was said for the respondent on the constitutional point that under section 2 of the Act of 1871 the Dominion Parliament in setting up or establishing the Province of Saskatchewan could have made a redistribu-

[28] (1911) 17 W.L.R. 71, 75.

[29] [1916] 2 A.C. 429; 32 T.L.R. 700.

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tion of legislative powers, and in support of that argument reference was made to certain sections of the Manitoba Act, 1870, to the Orders in Council admitting Prince Edward Island and British Columbia, and to the Terms of Union between Canada and Newfoundland, and also to certain provisions of the Act of 1867 itself. It may not be observed, however, that all those Acts or Orders in Council by which the other Provinces were admitted to the Dominion after 1867 were ratified by the Imperial Parliament or by Orders in Council passed under the Imperial Parliament; and secondly, the remarkable thing is not the differences between the powers and constitutions of the various Provinces, but the similarity, There was, in fact and in substance, never any change in the distribution of legislative powers as set up in sections 91 and 92 of the Act of 1867. [Reference was made to *Rimmer* v. *Hannon*,[30] *In re Natural Resources (Saskatchewan)*[31] and *Hudson's Bay Co.* v. *Bratt's Lake Rural Municipality*.[32]] If Parliament took away from section 92 a head of legislation which under that section would be committed to the Province it would lead to a legislative vacuum. All the authorities have always referred to this division of powers between the Dominion and the Provinces without drawing any distinction between Saskatchewan and Alberta and the other Provinces.

The appellant can equally rest his case on the terms of section 3 of the Act of 1886, which was in force when the Act of 1905 was passed. *Canada Southern Railway Co.* v. *International Bridge Co.*[33] shows that the Acts of 1867 and 1871 are to be read together; and see also Halsbury's Laws of England, 2nd ed., vol. 31, p. 486, para. 611. Reading the two Acts together, the Dominion Parliament had no power to take away on the establishment of the Province of Saskatchewan any of the legislative powers entrusted to it by section 92 of the Act of 1867. [Reference was made to *Bank of Toronto* v. *Lambe*.[34]]

1953 A.C. p. 609.

Finally, the business tax is not colourable legislation to defeat clause 16. It is a tax on a person carrying on a business; it is not a property tax within the meaning of the exempting clause 16, for (*a*) it is assessed only on those

[30] (1921) 60 D.L.R. 637.
[31] [1932] A.C. 28, 39; 48 T.L.R. 24.
[32] [1919] A.C. 1006.
[33] (1882) 8 App. Cas. 723, 727.
[34] 12 App. Cas. 575; 3 T.L.R. 742.

carrying on business; and (*b*) the business tax is in addition to a tax on land. There may be persons carrying on business who, because they do not occupy premises, would escape business tax. It was said in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*[35] that: "It is urged . . . "that in a taxing Act clear words are necessary in order to "tax the subject. Too wide and fanciful a construction "is often sought to be given to that maxim, which does not "mean that words are to be unduly restricted against the "Crown, or that there is to be any discrimination against the "Crown in those Acts." *City of Halifax* v. *Fairbanks' Estate* [36] is different from the present case.

July 6. The judgment of their Lordships was delivered by VISCOUNT SIMON who, after making the introductory statement set out above, continued : As to (*a*)—the first of the questions to which the appeal is limited by the Order in Council granting special leave to appeal—the appellant contends that the Parliament of Canada in passing the Saskatchewan Act, 1905, and thereby creating the new Province of Saskatchewan and including it in the Union had no power to provide that the provincial legislature, when making laws in relation to direct taxation within the Province in order to the raising of revenue for provincial purposes, or in relation to municipal institutions in the Province, should exercise those powers "subject to the provisions of "section 16 of the contract," but that the effective taxing powers of the legislature of the new Province remain as extensive as the powers conferred by section 92 (2) of the British North America Act, 1867, upon the legislature of each of the Provinces originally included in the Federation. This amounts to saying that section 24 of the Saskatchewan Act should be disregarded as being ultra vires of the Parliament of Canada.

As to (*b*), the appellant contends that if effect is to be given to section 24 and to the provisions of clause 16 of the said contract, which thus provide a certain exemption from taxation by the new Province, or by any municipal corporation therein, the result is nevertheless to leave the respondent company liable to "business tax" under the City Act, 1947, of the Province.

[35] [1921] 1 K.B. 64, 71; 37 T.L.R. 33 [36] [1928] A.C. 117; 44 T.L.R. 5.

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1953 A.C. p. 610.

Their Lordships will first deal with the former of the two questions above formulated. It is obvious that, if this first question is answered in favour of the appellant, the second question becomes immaterial, for if the provincial powers of taxation possessed by the Province of Saskatchewan are as wide as those contained in section 92 without the fetter imposed by clause 16 of the contract and section 24 of the Saskatchewan Act, it is immaterial how clause 16 is construed and applied, and the business tax which has been enacted by the Saskatchewan legislature will be imposed on the respondent company in common with all other persons and enterprises carrying on business within the Province.

This first question could only be raised on appeal to the Privy Council inasmuch as it had already been in effect decided in a sense adverse to the appellant's contention in the judgment of the Supreme Court of Canada, delivered by Newcombe J. on behalf of the court, in the *Reference re Constitutional Validity of Section* 17 *of the Alberta Act*.[1] The appellant contended before the Board that Newcombe J.'s judgment leading to this conclusion in the Alberta reference was wrong, and their Lordships were therefore invited to dissent from the view of Newcombe J. and to hold that section 24 of the Saskatchewan Act has no effect.

Although the British North America Act, 1867, provided for a federation of four Provinces only, viz., Quebec, Ontario, Nova Scotia and New Brunswick, the statesmen who were responsible for framing the Act contemplated from the beginning the enlargement of the federal area so as to include the whole of what is now Canada. To the west of the area included in the original Federation lay an immense territory stretching to the Rocky Mountains and beyond to the Pacific. The area immediately to the west (which had originally been granted to the Hudson's Bay Company by the Charter of 1670) was known as Rupert's Land and the North-West Territories, and between the Rocky Mountains and the Pacific Ocean lay the colony of British Columbia, which already had a separate legislature. Consequently, section 146 of the Act made provision for the admission into the Union of territories not at first included within the

[1] [1927] S.C.R. 364.

boundaries of Canada. The section provided: "It shall be "lawful for the Queen, by and with the advice of Her "Majesty's most honourable Privy Council, on addresses "from the Houses of the Parliament of Canada, and from "the Houses of the respective legislatures of the Colonies "or Provinces of Newfoundland, Prince Edward Island, and "British Columbia, to admit those Colonies or Provinces, or "any of them, into the Union, and on address from the "Houses of Parliament of Canada, to admit Rupert's Land "and the North-Western Territory, or either of them, into "the Union, on such terms and conditions in each case as "are in the addresses expressed and as the Queen thinks fit "to approve, subject to the provisions of this Act; and the "provisions of any Order in Council in that behalf shall "have effect as if they had been enacted by the Parliament "of the United Kingdom of Great Britain and Ireland."

British Columbia entered the Union in 1871 on the terms and conditions scheduled to the Order in Council of May 16, 1871, for British Columbia was a "settled" Colony and thus required no statutory provision to create it an additional Province of Canada. Rupert's Land and the North-West Territories had become part of Canada pursuant to the Rupert's Land Act, 1868, which authorized the surrender of the land of the Hudson's Bay Company to the Crown and which further gave power by Order in Council on address from the Houses of the Parliament of Canada to admit the surrendered territory into the Dominion of Canada.

The project of a trans-continental railway which would connect the Pacific coast with the railways in the east of Canada had long been in the minds of Canadian statesmen, and more than one effort had been made to realize the project and attract finance for such a railway. If it could be created, it would not only contribute to the development of trade, but would bind all parts of the Canadian continent together. But in order that the project should be achieved by creating a company, it was necessary to offer investors terms which would attract their support for a railway which would have to traverse immense areas of wild and thinly populated country, and would involve the carrying of its track by steep gradients over the Rocky Mountains. It was among the terms and conditions insisted upon by British Columbia for its admission into the Union that the Government of the

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Dominion should assume "the obligation of causing a "railway to be constructed, connecting the seaboard of "British Columbia with the railway system of Canada." (See first recital in the preamble of the Canadian Pacific Railway Act, 1881.) Clause 16 of the contract, which was ratified by that Act, was one of the inducements, and other clauses of the contract provided that the Government of the Dominion should make a grant to the company of the lands required for the road-bed and the other sites necessary for the convenient and effective construction and working of the railway, that materials of construction should be admitted free of duty, and that there should be granted to the company blocks of land on each side of the railway, which would, of course, increase in value when the railway was made and worked.

It is to be observed that section 146 of the British North America Act, which authorized the inclusion of Rupert's Land and the North-Western Territories into the Union, did not in terms authorize the creation of new Provinces out of these areas when admitted. Notwithstanding this, the Manitoba Act, 1870, of the Canadian Parliament (33 Vict. c. 3) provided for the creation and constitution of the Province of Manitoba, which was carved out of these territories as soon as they were admitted into the Union. Doubts appear to have been entertained respecting the powers of the Parliament of Canada to establish such Provinces, and consequently the United Kingdom Parliament enacted the British North America Act, 1871 (34 & 35 Vict. c. 28), which by section 5, confirmed the Manitoba Act, and by section 2 provided as follows: "The Parliament of Canada may from "time to time establish new Provinces in any territories "forming for the time being part of the Dominion of Canada, "but not included in any Province thereof, and may, at the "time of such establishment, make provision for the con-"stitution and administration of any such Province, and for "the passing of laws for the peace, order, and good govern-"ment of such Province, and for its representation in the "said Parliament."

It is to be noted that the Province of Manitoba thus created was not an exact replica of the Provinces created in 1867, but the provisions of the British North America Act, 1867, so far as generally applicable to the Provinces

previously composing the Dominion were to apply to the Province of Manitoba "except so far as the same may be "varied by this Act" (section 2). Examples of such variation may be found in section 22, section 23 and section 27 of the Manitoba Act.

It was under these powers conferred by the Act of 1871 that the Parliament of Canada enacted the Saskatchewan Act in 1905 and included in it section 24, which has already been set out. It will be observed that clause 16 of the contract of 1880 did not promise any exemption from taxation by the original Provinces, for they had taxing powers under section 92, which could not be cut down by the Dominion. The exemption provided for was "from taxation "by the Dominion, or by any Province hereafter to be "established," and hence when the Province of Saskatchewan was carved out of Rupert's Land and the North-West Territories, section 24 was inserted by the Parliament of Canada in an effort to keep faith with the Canadian Pacific Railway Company.

1953 A.C. p. 613.

The question, therefore, which their Lordships have first to decide, is whether section 24 is validly enacted.

Mr. Leslie's contention, supported with energy and ingenuity by Lord Hailsham for the intervener representing Manitoba, was that the Dominion Parliament was given no power by the Imperial Act of 1871 to limit the right of the new Province of Saskatchewan to tax under the terms of section 92. They contended that the authority which the Act of 1871 gave to the Dominion Parliament to carve out of the added territory "a Province" was an authority to create a Province with powers identical with those of the Provinces already created by the Act of 1867, and that no fetter upon the power of taxation of the new Province was permitted. To this Mr. Carson, for the respondent railway company, replied that even in the Act of 1867 the powers of taxation conferred upon the four original Provinces were not uniform; for example, although indirect taxation was a Dominion subject (section 91 (3)), yet, by section 124, the right was conferred on the Province of New Brunswick to levy lumber dues. And other examples could be given. There was thus no set pattern of "a Province" in the Act

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of 1867, which was bound to be followed in creating the new Province of Saskatchewan. The development of the added territories in 1871 had not advanced so far as the development of either the old Provinces or of Manitoba, so that it may very well have been thought necessary to give the Dominion Parliament freedom of action in the creation of new Provinces, not only as to the time of their creation but also as to the extent of powers of taxation which should be conferred upon them.

Section 2 of the Act of 1871 empowers the Parliament of Canada, at the time when it establishes new Provinces in the added territories, to make provision—(*a*) For the constitution and administration of any such Province; (*b*) for the passing of laws for the peace, order, and good government of any such Province; and (*c*) for its representation in the Dominion Parliament. The words "peace, order, and good "government" are words of very wide import, and a legislature empowered to pass laws for such purposes had a very wide discretion. But Mr. Leslie and Lord Hailsham emphasized the distinction between section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order, and good government in territories not included in a Province, and section 2, which only enabled them to provide for the passing of laws for the peace, order, and good government of a Province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the Province. The prescription, they contended had been done for good and all by section 92 of the Act of 1867.

1953 A.C. p. 614.

But their Lordships would observe that if this argument was well founded the words in section 2 of the Act of 1871 "for the passing of laws for the peace, order, and good "government" would be superfluous. The power to make provision for the "constitution" of the new Province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which the appellant and Lord Hailsham contend.

The appellant further relied on the phrase "subject to the "provisions of this Act" in section 146 of the Act of 1867 and contended that this phrase implied a structure of Provinces analogous to the original Provinces. But so far as the lands comprising Rupert's Land and the North-West Territories are concerned, section 146 was exhausted when they were admitted to the Union, as they were by the Rupert's Land Act, 1868. It appears to their Lordships that section 146 is therefore irrelevant to the issue they have to decide.

The appellant also relied on section 3 of the British North America Act, 1886, which directed that the 1867 Act and the 1871 Act should be construed together. The expression "Province," it was said, must therefore be given throughout the meaning attached to it in the Act of 1867, and this involved that every Province must have full section 92 powers. With great respect, this argument seems to involve a complete non sequitur. Every Province created or to be created must, of course, be a Province in the Dominion of Canada, but the Act of 1867 contained no such definition of Province as would involve any conflict between that Act and the 1871 Act. There is no complete equality of powers between the four original Provinces. The Manitoba Act, 1870, shows that an Act constituting a Province might depart from the strict 1867 pattern. No doubt one reason for the passing of the 1871 Act was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of section 2 of the Manitoba Act recognizing variations has been introduced into all the documents creating a Province since that date—see paragraph 10 of the schedule to the British Columbia Order in Council of May 16, 1871, the Resolution relating to Prince Edward Island scheduled to the Prince Edward Island Order in Council of June 26, 1873, section 3 of the Saskatchewan Act, 1905, section 3 of the Alberta Act, 1905, and section 3 of the Terms of the Union between Canada and Newfoundland scheduled to the British North America Act, 1949.

1953 A.C. p. 615.

From the time that the North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under section 5 of the Rupert's Land Act, 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new Provinces

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out of the added areas, could not make such deviation from section 92 as was necessary to make effective acts done under the powers conferred on it by section 5 of the Rupert's Land Act, 1868, and section 4 of the 1871 Act. These considerations support the conclusion of the Supreme Court in the *Alberta reference*,[1] and their Lordships are not prepared to differ from it.

Mr. Carson advanced two alternative grounds for upholding section 24 of the Saskatchewan Act, claiming (1) that it was validated by the second paragraph of section 2 of the 1886 Act; and (2) that clause 16 of the agreement when approved by the Dominion Act of 1881 was part of inter-provincial railway legislation, and therefore within Dominion competence under section 91 (29), and section 92 (10) of the Act of 1867, and that section 24, which was only included to make clause 16 effective, must also be regarded as such railway legislation within the competence of the Dominion Parliament.

Their Lordships, without pronouncing upon the validity of either of these arguments, prefer to rest their conclusion on the other grounds already stated.

There remains the question whether the language of clause 16 is such as to prohibit the imposition of "business tax" upon the respondent company. Notwithstanding that the exemption provided by the clause is conferred on the physical property there mentioned, all taxes are exacted from and paid by persons, and the question comes to be whether the respondent company, as the owner and user of the properties mentioned, is free from taxation in respect of them. Mr. Leslie and Lord Hailsham argue that the business tax imposed by the City Act, 1947, of Saskatchewan was imposed on persons and companies carrying on a business and not upon their property or upon their ownership or user of property. On this view, the provision that the liability to business tax of a taxpayer was measured by the floor-space or area which he used while carrying on his business was nothing more than a "yardstick" to ascertain the amount for which the taxpayer was liable under the tax. There are, no doubt, many instances in which it is important to distinguish between the nature of the tax imposed and the

1953 A.C. p. 616.

[1] [1927] S.C.R. 364.

measure of the amount of tax to be paid. For example, British income tax is imposed on the income of the taxpayer in the year of charge, but the amount of tax is measured by reference to income in an earlier year. But where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is "forever free from taxation" the tax so measured cannot be regarded as something lying outside the exemption.

Their Lordships agree with the view of the majority of the Supreme Court that in the present instance the tax in question is imposed upon the owner of things which he is using in his business. As Kellock J. observed: "It would be "an extraordinary result if the proper interpretation of this "exemption were to be said to be that while taxes imposed "upon the owner in respect of his ownership of these things "fall within the exemption, nevertheless taxes imposed "upon the owner in respect of his use of the same items do "not."

Locke J. stated the contention thus: "The position "adopted on behalf of the Province of Saskatchewan put "bluntly is this:—that while neither the physical property "defined by clause 1 nor the Canadian Pacific Railway "Company in respect of its ownership of that property is "liable to taxation, so-called business taxes may be levied "upon the company in respect of its business of operating "it. While the language of clause 16 is that the property "shall be 'forever free from taxation' by any Province "thereafter to be established, it is said that to tax the com- "pany in respect to the *use* of the property (itself a term "of the exemption), is not to tax the property and that that "alone is prohibited."

That judge went on to observe: "Clause 16 of the con- "tract does not grant an absolute exemption of the stations, "station grounds, buildings and other property referred to, "but only such as are used for the construction and working "of the railway and, in my opinion, if buildings which fell "within the description ceased to be used by the owner or "operator of the property for such purposes the exemption "would be lost. Since, therefore, it is the buildings, station "grounds, yards and other property when used for these "purposes which are declared to be forever free from taxation "by the Dominion or by any Province thereafter to be

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"established, I think it cannot be said that a tax upon the "owner in respect of the use of the property for the purpose "of working the railway is not squarely within the exemption. "To construe the clause otherwise is to say that the properties "mentioned are exempt from all taxation *when* used for the "defined purpose, but *if* they are so used that the owner may "be taxed in respect of that use. I am unable so to construe "the clause."

Their Lordships agree with this construction of the clause and have reached the conclusion that the exemption operates to relieve the respondent company from the tax.

In the course of the argument the decision in *City of Halifax* v. *Fairbanks' Estate*[2] was more than once referred to. That decision contains sentences which, detached from their context, were prayed in aid to reinforce the case for the respondents. But the point at issue in that case was different, viz., whether the "business tax" there involved was a direct tax, and was moreover so complicated by provisions for treating the owner of property let to the Crown as notionally the occupier, that their Lordships prefer not to rest their conclusions on it. It is unnecessary to say more than that the case does nothing to impair or qualify those conclusions.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Lawrence Jones & Co.; Blake & Redden; Charles Russell & Co.*

[2] [1928] A.C. 117; 44 T.L.R. 5.

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